Supreme Court, U.S.
FILED
OCT 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-602

No.

IN THE

Supreme Court of the United States

October Term, 1988

ALLIED CHEMICAL, an operating unit of Allied Corporation,
Petitioner,

against

NIAGARA MOHAWK POWER CORPORATION and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondents.

Petition for Writ of Certiorari to the New York State Court of Appeals

PAUL A. FEIGENBAUM*
LAWRENCE H. COOKE
THOMAS A. GRUE
COUCH, WHITE, BRENNER, HOWARD & FEIGENBAUM
Of Counsel
Attorneys for Petitioner
330 Broadway
Albany, NY 12201
(518) 434-1161

**Counsel of Record*

October 5, 1988

Questions Presented

This petition for certiorari concerns implementation by the States of the federal Public Utility Regulatory Policies Act of 1978 ("PURPA", 16 USC section 2601 *et seq.;* Appendix H-10). It arises out of a ruling of the New York State Court of Appeals that petitioner Allied Chemical ("Allied")[1] is precluded by the doctrine of *res judicata* from asserting a claim for contract damages against respondent Niagara Mohawk Power Corporation ("Niagara Mohawk") as a result of a prior determination by respondent Public Service Commission of the State of New

---

[1]The parties to this action are set forth in the caption. Allied Corporation is now known as Allied-Signal Inc. As required by Rule 28.1 of this Court, the following information as to entities that may be considered, for the disclosure purposes of such rule, to be subsidiaries or affiliates of Allied Corporation is supplied although Allied does not necessarily consider these entities to be "affiliates" for all purposes: Ferranti-Bendix Power Generation Limited; Ingold Electrodes, Inc.; Enscor Inc.; Amoricaine de Fonderie-Le Chatelet, S.A.; Bronzavia Air Equipment, S.A.; Freudenberg, S.A.; TENSA, S.A.; Transpar Iberica, S.A.; Bendix Mexicana, S.A. de C.V.; FIAAM, S.p.A.; Kalyani Brakes Limited; Bendix Electronics Korean, Limited; Chico Corporation; Compania Industrial de Fluorita, S.A.; Compania Metalurgica de Parral, S.A.; Hankuk Brake Industrial Co., Ltd.; Hydrotec S.A.; International Turbine Engine Corporation; Leaseway All-Services, Inc.; Nippon Amorphous Metals Co., Ltd.; Nirlon Synthetic Fibres and Chemicals, Ltd.; Normalair Garrett (Holdings) Ltd.; Dynamic Turbocharger Services Pty., Ltd. Queensland; Dynamic Turbocharger Services Pty., Ltd. Victoria; Asia Pacific Resin Corporation; Doosan Electro-Materials Co., Ltd.; Norplex/Oak India Ltd.; Quimobasicos, S.A.; SM Engineering Co., Ltd.; Synektron Corporation; Union Texas Petroleum Holdings, Inc.; UM Holdings B.V.; UOP Management Services (Saudi Arabia) Limited; the Signal Companies, Inc.; Eltra Corporation; Universal Oil Products Company/UOP, Inc.; The Bendix Corporation; Allied Overseas Finance Company; Aurex, S.A. de C.V.; Dai-ichi Denshi Kogyo, Kabushiki Kaisha; Enertech; Engenics, Inc.; Eotec Corporation; HBH Company; International Robomation Intelligence (IRI); Jidosha Kiki Kabushiki Kaishal; Maxwell Laboratories Inc.; Turbodina S.A.I.C.

York ("Commission"), a New York State administrative agency.

The questions are:

1. Whether the decision by the New York State Court of Appeals—erroneously holding that PURPA does not pre-empt any jurisdiction of respondent Commission to redefine terms, such as "qualifying facility", that are defined by PURPA—conflicts with this Court's decision in *American Paper Institute, Inc. v. American Electric Power Service Corporation,* 461 US 402, 76 LEd2d 22, 103 SCt 1921 (1983), and decisions of other state courts of last resort.

2. Whether said decision of the New York State Court of Appeals determines an important and unresolved question of law that should be reviewed and decided by this Court because it does violence to, and destroys, the fabric of the national statutory scheme embodied in PURPA.

TABLE OF CONTENTS

Page

Questions Presented i

Opinions Below 1

Jurisdiction 2

Constitutional, Statutory and Regulatory Provisions Involved 2

Statement of the Case 3

Nature of the Action 3

Underlying Facts 3

The Complaint 8

Prior Proceedings 9

The Treatment of the Motions in the State Trial Court 10

The Appellate Division Opinion 10

The New York State Court of Appeals Opinion 11

Reasons for Granting the Petition 13

1. The New York Court of Appeals' failure to recognize the controlling effect of PURPA and the FERC regulations issued pursuant thereto is in conflict with decisions rendered by this Court and the courts of last resort of other states 14

TABLE OF CONTENTS, Cont. Page

2. The question at issue relates directly to the extent of the jurisdiction of state regulatory bodies to implement PURPA. It is an important question—both in this specific context and in the broader context of federalism—that should be settled by this Court 23

Conclusion 26

APPENDICES:

Appendix A—Allied Chemical v. Niagara Mohawk Power Corp., 72 NY2d 271, ____ NYS2d ____ (1988)..... A-1

Appendix B—Order on Remittitur of New York State Court of Appeals in Allied Chemical v. Niagara Mohawk Power Corp..... B-1

Appendix C—Allied Chemical v. Niagara Mohawk Power Corp., 129 AD2d 233, 517 NYS2d 635 (4th Dept. 1987)..... C-1

Appendix D—Order of New York State Supreme Court, Appellate Division, Fourth Department, in Allied Chemical v. Niagara Mohawk Power Corp D-1

Appendix E—Order of New York State Supreme Court, Onondaga County, in Allied Chemical v. Niagara Mohawk Power Corp. E-1

Appendix F—New York State Public Service Commission Ruling with Respect to the Niagara Mohawk-Allied Dispute and Proposed Policy

TABLE OF CONTENTS, Cont. Page

Statement Applicable to Qualifying Facilities that Provide Old Capacity (Issued: January 22, 1985) F-1

Appendix G—New York State Public Service Commission Policy Statement Applicable to Qualifying Facilities That Provide Old Capacity (Issued: February 14, 1986) G-1

Appendix H—Constitutional, Statutory and Regulatory Provisions Involved H-1

U.S. Const., art. VI, cl.2 ..... H-1

16 USC section 796 ..... H-1

16 USC section 824a-3 ..... H-3

16 USC section 2601 *et seq.* H-10

New York Public Service Law Section 66-c ... H-43

18 CFR Part 292.101(b) H-46

18 CFR Part 292, Subpart B H-46

18 CFR section 292.304(b) H-60

Maine Public Utility Commission Rules and Regulations, Chapter 36, sections 1(A)(25), 2 ..... H-61

Maine Public Utility Commission Rules and Regulations, Chapter 36, Section 4(C) H-65

TABLE OF CONTENTS, Cont. Page

Appendix I—Amended Complaint (without exhibits) I-1

Appendix J—Affidavit of James W. McTarnaghan in Opposition to Niagara Mohawk Power Corporation's Motion to Dismiss (without exhibits) J-1

Appendix K—Affidavit of James W. McTarnaghan in Opposition to Public Service Commission's Motion for Summary Judgment (without exhibits) K-1

TABLE OF AUTHORITIES

CASES:

American Paper Institute v. American Electric Power Service Corp., 461 US 402, 76 LEd2d, 103 SCt 1921 (1983)..... 13, 14, 15, 16

Appalachian Power Co. v. Public Service Commission, 630 F.Supp. 656 (S.D.W.Va. 1986), *aff'd*, 812 F2d 898 (4th Cir. 1987)..... 19

Bates Fabrics, Inc. v. Public Utilities Commission, 447 A2d 1211 (1982)..... 15, 16

City of New York v. Federal Communications Commission, 486 US ____, 100 LEd2d 48, 108 SCt 1637 (1988)..... 18, 24

Commissioner of Labor v. Hinman, 103 AD2d 886, 478 NYS2d 116 (3d Dept. 1984)..... 20

TABLE OF AUTHORITIES, Cont. Page

Consolidated Edison Co. of N.Y., Inc. v. Public Service Commission, 470 US 1075, 85 LE2d 132, 105 SCt 1831 (1985)..... 17, 23

Dolman v. United States Trust Co., 2 NY2d 110, 157 NYS2d 537, 138 NE2d 784 (1956) 25

FERC v. Mississippi, 456 US 742, 72 LEd2d 532, 102 SCt 2126 (1982)..... 23

Kansas City Power & Light Co. v. State Corporation Commission, 234 Kan. 1052, 676 P2d 764 (1984), *app. dism.*, 479 US 801, 93 LEd2d 4, 107 SCt 41 (1986)..... 15, 16, 17

Lane Construction Corp. v. Winona Construction Co., Inc., 49 AD2d 142, 373 NYS2d 882 (3d Dept. 1975)..... 20

Lee v. Consolidated Edison Co., 98 Misc2d 304, 413 NYS2d 826 (App. T., 1st Dept. 1978)..... 25

Matter of Consolidated Edison Co. v. Public Service Commission, 98 AD2d 377, 471 NYS2d 684 (3d Dept.), Mod., 63 NY2d 424, 483 NYS2d 153 (1984), *app. dism.*, 470 US 1075, 85 LED2d 132, 105 SCt 1831 (1985)..... 5, 17, 18, 20, 21

Matter of Harbolic v. Berger, 43 NY2d 102, 400 NYS2d 780, 371 NE2d 499 (1977) 22

Matter of Long Island Lighting Co. v. Horn, 49 Misc2d 717, 268 NYS2d 366 (Supt. Ct., Suffolk Co. 1964..... 20

TABLE OF AUTHORITIES, Cont. Page

Matter of Rosenbluth v. Finkelstein, 300 NY 402, 91 NE2d 581 (1950) 22

Matter of Trump—Equitable Co. v. Gleidman, 62 NY2d 539, 478 NYS2d 846, 467 NE2d 510 (1984)..... 22

McCarty v. McCarty, 453 US 210, 69 LEd2d 589, 101 SCt 2728 (1981) 25

Merchants' National Bank v. Wehrmann, 202 US 295, 50 LEd 1036, 26 SCt 613 (1906)..... 23

Nantahala Power & Light Co. v. Thornburg, 476 US 953, 90 LEd2d 943, 106 SCt 2349 (1986) 20

Nat'l Assoc. of Pharmaceutical Manufacturers v. Department of Health and Human Services, 586 F.Supp. 740 (S.D.N.Y. 1984)..... 24

Nutt v. Knut, 200 US 12, 50 LEd 348, 26 SCt 216 (1906)..... 23

Schneidewind v. ANR Pipeline Company, 485 US ____, 99 LEd2d 316, 108 SCt 1145 (1988). 19, 20

Sioux City Railroad Company v. Richmond, 82 US 3, 21 LEd 118 (1873) 23

Sisters of St. Dominick v. Orange & Rockland Power Co., 79 AD2d 1021, 435 NYS2d 332 (2d Dept. 1981) 24

Smith v. Resar, 406 F2d 141 (2d Cir. 1969)..... 24

TABLE OF AUTHORITIES, Cont. Page

Wabash Railroad v. Pearce, 192 US 179, 48 LEd 397, 24 SCt 231 (1904) 23

CONSTITUTION AND STATUTES:

United States Constitution, Article VI, clause 2... 2, 19

16 USC section 796..... 3, 21

16 USC section 824a-3(l) 21

16 USC section 2601, *et seq*..... *passim*

28 USC section 1257(3) 2

New York Civil Practice Law and Rules (CPLR) sections 3211, 3212..... 9

New York Public Service Law section 66-c..... 17

REGULATIONS:

18 CFR Part 292..... 3, 12, 21

18 CFR section 292.101(b) (1)..... 12, 16

18 CFR section 292.101(b)(6)..... 6, 12

18 CFR section 292.201-292.207..... 15

18 CFR section 292.304(b)..... *passim*

18 CFR section 292.304(b)(2) 14

18 CFR section 292.304(b) (3)..... 22

TABLE OF AUTHORITIES, Cont. Page

45 Fed Reg. 12,217 (1980) 25

Maine Public Utility Commission Rules and Regulations, Chapter 36:

Section 1(A)(25) 16

Section 2 16

Section 4(C) 16

MISCELLANEOUS AUTHORITIES:

Lock & Van Kuiken, "Cogeneration and Small Power Production; State Implementation of Section 210 of PURPA", *3 Solar L Rep* 659 (1981) .. 25

22 *NY Jur 2d* Contracts, section 202 25

21 NY PSC 66 ..... 4, 20, 21

22 NY PSC 1858 ..... 4, 20, 21

26 NY PSC 293 ..... 2, 7, 21

Orange & Rockland Utilities, Inc., 43 FERC paragraph 61,067 (1988) 17, 18, 20

Webster's Ninth New Collegiate Dictionary (1983), p. 256 3

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ALLIED CHEMICAL, an operating unit of Allied Corporation,

Petitioner,

v.

NIAGARA MOHAWK POWER CORPORATION and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

Petition for Writ of Certiorari to the New York State Court of Appeals

The petitioner Allied Chemical respectfully prays that a writ of certiorari issue to review the order and opinion of the New York State Court of Appeals in this case.

Opinions Below

The opinion of the New York State Court of Appeals (Appendix A) is reported at 72 NY2d 271, ____ NYS2d ____ (1988).

The opinion of the New York State Supreme Court, Appellate Division, Fourth Department, affirming the trial court's dismissal of the amended complaint on the

grounds of *res judicata* is reported at 129 AD2d 233, 517 NYS2d 635 (4th Dept. 1987), and is set forth in Appendix C. The order of the New York State Supreme Court, Onondaga County, dismissing the amended complaint was not reported and appears in Appendix E.

The "New York State Public Service Commission Ruling with Respect to the Niagara Mohawk-Allied Dispute and Proposed Policy Statement Applicable to Qualifying Facilities that Provide Old Capacity" (Issued: January 22, 1985) is unreported and is set forth in Appendix F hereto.

Following comments and submissions in response to its 1985 Proposed Policy Statement, on February 14, 1986, the New York State Public Service Commission issued its "Policy Statement Applicable to Qualifying Facilities that Provide Old Capacity." The Policy Statement, containing the Commission's findings, appears in Appendix G and is reported at 26 NYPSC 293.

Jurisdiction

The order of the New York State Court of Appeals (Appendix B) was entered on July 7, 1988. The jurisdiction of this Court is invoked under 28 USC section 1257(3).

Constitutional, Statutory and Regulatory Provisions Involved

The constitutional, statutory and regulatory provisions involved are set forth in pertinent part in Appendix H. They are:

United States Constitution, art. VI, cl. 2;
16 USC section 796;

16 USC section 824a-3(j);
16 USC section 2601 *et seq.;*
New York Public Service Law section 66-c;
18 CFR section 292, Subpart B;
18 CFR Part 292.101(b);
18 CFR Part 292.304(b).

Statement of the Case

Nature of the Action

This is an action by petitioner Allied for damages in the amount of $1,535,192.48, plus applicable interest, arising from respondent Niagara Mohawk's unquestionable breach, in 1984, of an October 1, 1981 contract ("Contract") with Allied. The action was commenced against Niagara Mohawk alone on April 29, 1986. Pursuant to an interim Bench order of the New York State Supreme Court, Onondaga County, on July 30, 1986, Allied was directed to add the Commission as a party defendant. In order to comply, Allied served a supplemental summons and amended complaint (Appendix I) which merely added respondent Commission as a named defendant without changing any allegations of the complaint and without seeking any relief against it.

Underlying Facts

The amended complaint alleges the following. Allied owns and operates an electric generating station and cogeneration facility[1] that is a "qualifying facility", as defined by PURPA and the regulations promulgated pursuant thereto (18 CFR Part 292) by the Federal Energy

[1]Cogeneration is the generation of electrical energy simultaneously from the same fuel or as a result of the same continuous process or manufacture. *See* 16 USC section 796(18); *Webster's Ninth New Collegiate Dictionary* (1983), p. 256.

Regulatory Commission ("FERC"). On October 1, 1981, Allied and Niagara Mohawk, a New York gas and electric corporation, entered into the Contract, the primary subjects of which are the purchase by Niagara Mohawk from Allied of excess electric power produced at Allied's cogeneration facility and the sale of back-up electric power to Allied by Niagara Mohawk.

In pertinent part, Article FIFTH of the Contract provides that

> " . . . either party may elect to replace the price for energy as specified above with an applicable rate specified by the [Commission] either in a general tariff approved by the Commission or upon petition by either party to this AGREEMENT" (Appendix I-2).

This provision was included in the Contract pursuant to a January 7, 1981, order by the Commission ("1981 Order") issued in Commission Case 27824, "Proceeding Regarding Implementation of Section 210 of [PURPA]", 21 NYPSC 66.

Subsequently, pursuant to an order in *Consolidated Edison Company of N. Y., Inc.*, Commission Case 27574, Opinion and Order No. 82-10, 22 NYPSC 1858, issued May 12, 1982 (hereinafter "Order 82-10"), Niagara Mohawk was ordered by the Commission to file a tariff establishing rates for, *inter alia,* the purchase by Niagara Mohawk of cogenerated power from "all qualifying facilities"[2] and the sale by Niagara Mohawk to "qualifying facilities" of supplementary, back-up and maintenance service. Order 82-10, 22 NYPSC at 1894-1897, 1900-1901.

---

[2]The reference is to that term as defined in PURPA and the FERC regulations. *See, e.g.*, Order 82-10, 22 NYPSC at 1868, 1870-1871, 1972.

On November 21, 1983, as directed by Order 82-10, Niagara Mohawk filed such tariffs, consisting of two new Service Classifications of P.S.C. No. 207 Electricity: S.C. No. 6—Purchase Of Electric Energy And Capacity ("SC-6"); and S.C. No. 7—Sale of Supplemental, Backup, And Maintenance Service ("SC-7"). The tariffs ultimately were approved by the Commission in February, 1984, to become effective February 20, 1984.

On March 20, 1984, shortly after the promulgation of those tariffs, Allied exercised its right of election pursuant to Article FIFTH of the Contract and demanded of Niagara Mohawk, effective immediately, that the original Contract prices for the sale of electric energy and purchase of backup electrical service be replaced by the prices reflected in the newly-filed tariffs, which, by their terms, expressly and unambiguously applied to *all* qualifying facilities as defined by PURPA, including Allied's facility.

Niagara Mohawk rejected Allied's request and filed with the Commission a Petition for a Declaratory Ruling in which it asked whether the SC-6 and SC-7 tariff rates were those "envisioned for use in the Commission's *order of January 7, 1981*"[3] as payment for energy purchased from a facility, like Allied's, on which construction had

[3]N.B.—The 1981 Order was *not* the order pursuant to which the tariff was filed. Rather, it was filed pursuant to Order 82-10. *See Matter of Consolidated Edison Co. v. Public Service Commission*, 98 AD2d 377, 380, 471 NYS2d 684 (3rd Dept. 1983), mod., 63 NY2d 424, 483 NYS2d 153 (1984), *app. dism.*, 470 US 1075, 85 LEd2d 132, 105 SCt 1831 (1985). As will be more fully discussed below, the 1981 Order merely directed the inclusion of the right of election in contracts such as the instant Contract. Order 82-10, on the other hand, determined explicitly the rates to which *all* qualifying facilities would be entitled (*i.e.*, full avoided costs) and directed the filing of tariffs by all utilities, including respondent Niagara Mohawk, reflecting the holding of Order 82-10.

begun prior to November 9, 1978.[4] In effect, Niagara Mohawk sought to avoid the combined effect of Order 82-10 and the 1981 Contract right of election, which permitted Allied to elect to receive a higher approved tariff rate. Allied filed a counterpetition and a complaint on June 19, 1984 asking the Commission to reaffirm its previous determination on rates, as stated in Order 82-10, that all qualifying facilities in New York were entitled to receive from utilities payment for electricity at a full avoided costs rate,[5] which would mean that Allied was entitled to elect the SC-6 tariff rate, and that Allied was entitled to purchase backup service from Niagara Mohawk at the SC-7 tariff rate.

Without any hearing, the Commission used the occasion to convert the issue into a generic rate proceeding in the context of its proceedings for the implementation of PURPA, involving all New York utilities and all qualifying facilities, in order to grapple for the first time with a particular issue: whether qualifying facilities providing "old capacity" and those providing "new capacity" should continue to receive the same tariff rates, *i.e.*, SC-6 and SC-7. Consequently, on January 22, 1985, in a Proposed Policy Statement ("1985 Proposed Policy Statement") issued in the context of "Case 27824—Proceeding Regarding Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978" (Appendix F), the Commission proposed a policy for determining, prospectively, the amount to be paid to individual qualifying

---

[4]Purchases of electricity from qualifying facilities on which construction commenced prior to November 9, 1978 are considered "old capacity". Purchases from qualifying facilities on which construction began after that date are considered "new capacity". 18 CFR section 292.304(b).

[5]This is the incremental cost to an electric utility of electric energy or capacity or both which, but for the purchase from a qualifying facility, the utility would generate itself or purchase from another source. 18 CFR section 292.101(b)(6).

facilities providing "old capacity" energy. Notwithstanding the clear language of Order 82-10 to the contrary,[6] the Commission stated that this was the first occasion it had to address the issue whether old capacity qualifying facilities were entitled to full avoided costs rates. Based on the erroneous conclusion that the use of the term "qualifying facility" in connection with the SC-6 tariff meant "new capacity qualifying facilities" only, the Commission concluded that Allied was not a qualifying facility for the purpose of entitlement to the SC-6 tariff. The Commission: (i) requested comments concerning the contemplated adoption of a new, proposed rate phase-in mechanism; (ii) directed respondent Niagara Mohawk to submit ". . .draft tariff amendments that would show how it would implement the phase-in mechanism outlined in this ruling *if* the proposed policy is adopted" (emphasis added); (iii) requested utilities to provide certain factual estimates concerning the potential effects of the proposal; and (iv) continued the proceeding in contemplation of completion of the foregoing.

It was not until February 14, 1986, after having assessed extensive comments and submissions in response to its 1985 proposal, that the Commission issued a "Policy Statement Applicable to Qualifying Facilities That Provide Old Capacity" ("1986 Policy Statement"; Appendix G), 26 NYPSC 293. It was in the 1986 Policy Statement that the Commission finally adopted a modified version of its 1985 phase-in rate proposal. The 1986 Policy Statement expressly states that the Commission had not previously stated its views concerning any distinction between old and new capacity for ratemaking purposes. *Id.* at 297. In it, the Commission concludes that old capacity qualifying facilities, such as Allied's, may be entitled to the SC-6,

[6]*See* pages 21-22, *infra.*

full avoided costs, rate or that they may receive rates on the basis of a phase-in of full avoided costs. The 1986 Policy Statement directs that utilities submit a tariff provision to implement the phase-in procedure finally adopted as another method for determining purchase rates from qualifying facilities. *Id.* at 300.

In the period prior to the issuance of the 1986 Policy Statement, which for the first time created a distinction between the rates for new and old capacity qualifying facilities, Allied periodically invoiced Niagara Mohawk for amounts due Allied under the SC-6 rate then in effect for all qualifying facilities. Niagara Mohawk deferred any response to Allied until after it received and reviewed the 1986 Policy Statement.

By letter dated February 24, 1986, Niagara Mohawk responded to Allied's demand. In essence, the response asserted Niagara Mohawk's (erroneous) view as to the retroactive, negating effect of the 1986 Policy Statement on the previously promulgated SC-6 tariff rate. Paradoxically, Niagara Mohawk conceded, at the same time, that Allied is entitled to the SC-7 tariff sales rate, filed at the same time as the SC-6 tariff purchase rate, and by its terms applicable to all qualifying facilities, as was the SC-6 rate.

The Complaint

Allied's amended complaint in this action (Appendix I) recites the foregoing facts and further alleges that: (i) the 1986 Policy Statement, by its express language, is the first time the Commission made any distinction between rates for qualifying facilities producing old and new capacity; (ii) although the 1986 Policy Statement and the tariffs thereafter filed in compliance will govern the rates for purchases made *after* February 14, 1986, the Contract

governs the parties' rights for all periods prior thereto; (iii) the only applicable rates from March 20, 1984 to February 14, 1986 were the SC-6 and SC-7 general tariff rates, which by their terms applied to all qualifying facilities, and under the language of the Contract, Allied was entitled to elect to receive those rates; (iv) Niagara Mohawk refused to pay the SC-6 rate; and (v) Allied has been underpaid, and therefore damaged, for the period from March 20, 1984 to February 14, 1986 in the amount of $1,535,192.48, plus interest, as provided in the tariffs.

Prior Proceedings

In May, 1986, Niagara Mohawk moved to dismiss the complaint pursuant to New York Civil Practice Law and Rules ("CPLR") 3211 on the following grounds: the complaint is barred by the doctrine of *res judicata* or collateral estoppel; the statute of limitations purportedly bars what Niagara Mohawk characterized as judicial review of a determination of the Commission, *i.e.*, the 1985 Proposed Policy Statement; and assuming the Commission did not squarely decide the matter at issue, the state trial court lacked jurisdiction to do so, or if there is concurrent jurisdiction, the courts should permit the Commission to decide the matter in the first instance.

Following service of the amended complaint, the Commission answered and moved for summary judgment pursuant to CPLR 3212 on the grounds of: *res judicata,* by virtue of the 1985 Proposed Policy Statement by the Commission; and statute of limitations, by virtue of the failure to seek judicial review of the 1985 Proposed Policy Statement. In the amended complaint and in the course of opposing both motions (Appendices I, J and K), Allied made express reference to PURPA and the FERC regulations as the source of its rights.

The Treatment of the Motions in the State Trial Court

The trial court granted defendants' respective motions from the Bench without stating the express basis for dismissal, although implicit in its interim order that the Commission be joined as a party-defendant is the trial court's apparent rejection of the argument that it had to defer to the jurisdiction of the Commission (although it erred in further directing joinder of the Commission, against whom no relief is sought).

The Appellate Division Opinion

Allied appealed to the New York State Supreme Court, Appellate Division, Fourth Department, from the order dismissing the amended complaint, and that intermediate appellate court unanimously affirmed the dismissal. In its briefs to that court Allied argued that the complaint is not barred by the doctrine of *res judicata* for the following reasons: (i) the doctrine does not apply to "legislative", ratemaking determinations by administrative agencies, which is the activity in which the Commission was engaged; (ii) the doctrine does not apply to this determination by the Commission, which constituted a redefinition of PURPA terms, because it was made outside the Commission's jurisdiction by virtue of the pre-emptive effect of the definitional scheme of PURPA and because it constituted prohibited, retroactive ratemaking; and (iv) to the extent respondents were relying on the 1985 Proposed Policy Statement, it lacked finality for *res judicata* purposes. In addition, Allied argued that the complaint was not barred on limitations grounds.

By opinion dated July 10, 1987, the Appellate Division concluded that the "PSC determination was quasi-judicial in nature, and * * * should be given collateral estoppel ef-

fect" (Appendix C). In so finding, the Appellate Division did not even mention Allied's arguments that the Commission's determination—a redefinition of the term "qualifying facility" made two years after the fact—could not be given preclusive effect in this subsequent contract action against Niagara Mohawk because the Commission lacked jurisdiction to redefine the term by virtue of the pre-emption doctrine and the doctrine prohibiting retroactive ratemaking. Rather, the court conceded: that an administrative determination made in the exercise of ratemaking is not an "adjudication" and is not entitled to *res judicata* effect; and that the Commission's determination was not made in the context of an adjudicatory proceeding. Notwithstanding these significant concessions, surprisingly, the Appellate Division held that the dispute between Allied and Niagara Mohawk was in fact adjudicatory in nature and that *res judicata* applies. The only reference by the court to federal law was the statement that Allied is an old capacity qualifying facility, citing PURPA and 18 CFR section 292.304.

The New York State Court of Appeals Opinion

Allied was granted leave to appeal to the New York State Court of Appeals by that court. In its briefs to that court, as in the Appellate Division, Allied asserted, *inter alia,* its federal pre-emption of jurisdiction argument.

On July 7, 1988, a unanimous Court of Appeals affirmed the lower courts' dismissal of the amended complaint on the ground that the matter at issue was fully litigated in the proceeding before the Commission and that it could not be relitigated in this action (Appendix A). In its opinion, the court first makes express reference to the mandates of PURPA concerning the purchase of electricity from qualifying facilities and notes that there may be a

distinction in the rates paid to old capacity and new capacity qualifying facilities, citing provisions of 18 CFR Part 292 to that effect.[7] It goes on to note that Allied is a qualifying facility producing old capacity and that it entered into the Contract with its Article FIFTH rate election provision. It also holds, as Allied has contended throughout, that the SC-6 "full avoided costs" tariff was promulgated pursuant to Order 82-10 and that after Allied sought that rate, there was a proceeding before the Commission, commenced by Niagara Mohawk, which the Commission considered ". . . in the context of its more general proceedings to implement PURPA . . ." After noting the procedural history of this matter, as set forth above, the court affirmed the dismissal of the complaint on the basis of the doctrine of *res judicata.*

Notwithstanding the significant statements demonstrating the recognition by the court that the Commission's actions were in implementation of PURPA, critically absent from the court's opinion is any discussion of the obvious pre-emption by PURPA of jurisdiction for the Commission to make the earlier administrative determination (the redefinition of "qualifying facility") which the court was giving preclusive effect, administrative jurisdiction being a *sine qua non* for the application of the doctrine of *res judicata* to an administrative agency's determination. Rather, the Court of Appeals simply concluded that the Commission could act "adjudicatively"; that in the earlier administrative proceeding, it was acting in an "adjudicative", rather than "legislative, ratemaking" capacity; that the issue here is the same as that in the earlier Commission proceeding; and that the Commission determination as to the applicable rate for qualifying facilities pro-

[7]It is noteworthy that while the court saw fit to refer to the FERC definition of "avoided costs" (18 CFR section 292.101[b][6]), it omitted any reference to the corresponding FERC definition of "qualifying facility" (18 CFR section 292.101[b][1]).

ducing old capacity is to be accorded preclusive effect here.

Reasons for Granting the Petition for Certiorari

The effect of the decision below is to grant to the Commission—and, by logical extension, to all public utility regulatory commissions—jurisdiction in an area that heretofore has been pre-empted by federal law—the jurisdiction to redefine terms, such as the term "qualifying facility", employed by PURPA. In fact, the Commission's jurisdiction is limited to *implementing* PURPA in accordance with its terms, not redefining those terms. Any other conclusion negates the intent underlying PURPA—the creation of a national energy policy—and gives virtual carte blanche to each of the 50 states to create its own separate policy under the guise of "interpreting" PURPA. That expansion of state jurisdiction into a federally pre-empted area is just what the New York State Court of Appeals accomplished here by giving *res judicata* effect to the Commission's prior action.

In giving preclusive effect to the extra-jurisdictional determination of the Commission, the court below has decided an important federal question in a way that squarely conflicts with this Court's decision in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 US 402, 76 LEd2d 22, 103 SCt 1921 (1983), as well as decisions of the courts of last resort of Maine and Kansas. If this decision is allowed to stand, it will jeopardize the statutory scheme envisioned by Congress in enacting PURPA by causing uncertainty about the extent of the pre-emptive effect to be given to the terms and conditions contained in PURPA and the permissible degree of latitude for state action.

Coherent implementation of a national energy policy is at stake. Because of the importance of this issue, and because of the conflict of the New York Court of Appeals' decision with *American Paper Institute* and other state court decisions, this Court should exercise its discretion and grant the petitioner review on certiorari.

1. The New York Court of Appeals' failure to recognize the controlling effect of PURPA and the FERC regulations issued pursuant thereto is in conflict with decisions rendered by this Court and the courts of last resort of other states.

The essence of the error below is the direct result of the failure of the New York Court of Appeals to recognize, let alone discuss, the pre-emptive effect of PURPA and the FERC regulations which gave the Commission jurisdiction only to implement, not redefine, PURPA. That very failure to recognize the pre-emption doctrine—which compels the conclusion that the Commission lacked jurisdiction to render the determination it did, and concomitantly, prevents that extra-jurisdictional determination from having any *res judicata* effect—is inconsistent with decisions of this Court, the courts of last resort of Maine and Kansas and, ironically, with a prior decision of the same New York Court of Appeals, in which this Court later dismissed an appeal.

The decision below effectively contravenes so much of this Court's holding in *American Paper Institute, Inc. v. American Electric Power Service Corp., supra,* as addresses the promulgation of 18 CFR section 292.304(b)(2) (Appendix H-60)[8]. In *American Paper Institute,* this Court correctly proceeded on the assumption that the

[8]The reference is to the page in the appropriate Appendix to this petition, as are all similar references hereafter.

FERC full avoided costs regulation there at issue applies to all qualifying facilities. 461 US 416. It was expressly noted that "qualifying facility" is a term defined pursuant to PURPA and the FERC regulations. 461 US at 405. In particular, this Court cited to 18 CFR sections 292.201-292.207 (Appendix H-46—H-57) as the definitional subpart of the governing federal regulations, not 18 CFR section 292.304 (Appendix H-60). This Court held that while flexible, in the absence of a waiver or specific contractual agreement (neither of which are present here), FERC could promulgate the full avoided costs regulation, on its face applicable to all qualifying facilities without regard to whether old or new capacity is involved. Thus, this Court's acceptance of the FERC definition of "qualifying facility" forms the bedrock of its holding in *American Paper Institute.*

The decision below, however, affords *res judicata* treatment to the Commission's redefinition (purportedly by virtue of 18 CFR section 292.304 which is not the definitional section for that term) of "qualifying facility" to mean only "qualifying facilities producing new capacity". This has the insidious effect not only of granting the Commission definitional jurisdiction it does not have, but also of upholding the exercise of that jurisdiction in circumstances which resulted in the redefinition of a PURPA term contrary to that found to be controlling by this Court in *American Paper Institute.*

Contrary to the decision below, the highest courts of Maine and Kansas have held that PURPA and the FERC regulations promulgated thereto have pre-emptive effect in cases dealing with the FERC full avoided costs regulation (18 CFR section 292.304 [Appendix H-60]). *See Bates Fabrics, Inc. v. Public Utilities Commission,* 447 A2d 1211 (1982), and *Kansas City Power & Light Co. v. State*

Corporation Commission, 234 Kan. 1052, 676 P2d 764 (1984), *app. dism.*, 479 US 801, 93 LEd2d 4, 107 SCt 41 (1986). The decision below is thus in conflict with those decisions by the courts of last resort in those two states.

In *Bates Fabrics, Inc. v. Public Utilities Commission, supra*, the Supreme Judicial Court of Maine recognized the pre-emptive and controlling effect of PURPA as the basis for its holding that the Maine Public Utilities Commission correctly determined that it did not have jurisdiction to decide a particular issue. It is of critical note that *Bates*, like this case, involved qualifying facilities producing old capacity. In *Bates*, however, it was assumed by the Maine court that the full avoided costs rate contained 18 CFR section 292.304 (Appendix H-60) and Maine Public Utilities Commission Rules and Regulations, Chap. 36, section 4(C) (Appendix H-65), were applicable to old *and* new capacity qualifying facilities.[9] The instant decision by the New York Court of Appeals proceeded on a completely different assumption as to the meaning of "qualifying facility", accepting the redefinition by the Commission. In that manner it is in direct conflict with *Bates*.

Building on *American Paper Institute*, the Supreme Court of Kansas, in *Kansas City Power & Light Co. v. State Corporation Commission, supra*, concluded that federal law, in the form of PURPA and the FERC regulations, pre-empts the field in the area of cogeneration and precludes a state from setting rates for purchases from cogenerators that are higher than full avoided costs. In the course of its analysis, moreover, the Kansas Supreme Court took note of, and held to be controlling, the federal definitional scheme. The Commission determination here that has been held to be *res judicata*—a redefinition of,

[9]The Maine regulations are virtually verbatim PURPA and the FERC regulations in all pertinent respects. *Compare, e.g.*, section 1(A)(25) of the Maine regulations with 18 CFR section 292.101(b)(1) (Appendix H-61 and H-46, respectively).

rather than deference to, the federal scheme—is directly analogous to the type of state action that was held in *Kansas City Power & Light Co.* to be pre-empted by federal law. By giving the determination of the Commission preclusive effect, the New York Court of Appeals effectively held that the Commission was not jurisdictionally pre-empted from acting as it did, a conclusion that is at odds with *Kansas City Power & Light Co.*

Ironically, the decision below also is at odds with *Matter of Consolidated Edison Co. v. Public Service Commission, supra,* an earlier New York Court of Appeals decision, from which this Court dismissed the appeal (*sub nom., Consolidated Edison Co. of N.Y., Inc. v. Public Service Commission,* 470 US 1075, 85 LEd2d 132, 105 SCt 1831 [1985]). In *Matter of Consolidated Edison Co.,* the New York Court of Appeals *accepted* the principle of the pre-emptive effect of PURPA, prohibiting state action in disregard of its mandates, but found on the facts there present that some of the state action there in question, New York's "six-cent purchase" statute (N.Y. Public Service Law ["PSL"] section 66-c [Appendix H-43]), which allowed the payment of more than full avoided costs to some qualifying facilities, was not pre-empted. In doing so, the court expressly adopted the definitional scheme contained in PURPA and the FERC regulations (63 NY2d at 432, fn. 3), a definitional scheme that the Commission changed in the determination now being given preclusive effect by the Court of Appeals.[10] This

[10]Since *Matter of Consolidated Edison,* FERC has issued a determination voiding section 66-c of the Public Service Law. *Orange & Rockland Utilities, Inc.,* 43 FERC paragraph 61,067 (1988). In so holding, FERC expressly noted that the New York statute was promulgated pursuant to an express, limited exemption created by FERC from the otherwise pre-emptive effect of PURPA and the FERC regulations. In effect, FERC now has asserted its jurisdiction to the per-

(Footnote continued on following page)

Court then dismissed the appeal in *Matter of Consolidated Edison,* where the pre-emption doctrine had been upheld in principle. In the instant case, the New York Court of Appeals has reversed its own prior holding by rejecting the pre-emption doctrine entirely. The New York Court of Appeals decision here flies in the face of decisions of this Court and other state supreme courts and lacks consistency even with its own prior decision. These inconsistencies should be resolved by this Court, and the decision below should not be permitted to stand.

Nor does the issue whether to grant certiorari exist in a vacuum, having academic interest only. By ignoring and disregarding controlling principles of pre-emption, the New York Court of Appeals erroneously held on the merits that the determination of the Commission was not made in excess of its jurisdiction. As a result, that extra-jurisdictional administrative determination erroneously was given *res judicata* effect so as to bar Allied's contract claim against Niagara Mohawk, foreclosing Allied from recovering damages in an amount that now approaches or exceeds $2,000,000.00, including interest.

Allied's argument that the pre-emption of jurisdiction for the Commission to rule as it did bars that ruling from being accorded *res judicata* effect was just one of a number of independent grounds asserted by Allied in this action as to the unavailability to respondents of the doctrine of *res judicata.* The other grounds were: the doctrine does not apply to legislative, ratemaking decisions by an ad-

---

(Footnote continued.)
missible limit, its view that pre-emption should be expanded is entitled to significant weight (*see, e.g., City of New York v. Federal Communications Commission,* 486 US ____, 100 LEd2d 48, 108 SCt 1637 [1988]), and the decision below is at odds with the expansion of the pre-emptive area effected by FERC in *Orange & Rockland Utilities.*

ministrative agency such as the instant determination; the Commission lacked jurisdiction to act as it did in an additional respect—it may not engage in retroactive ratemaking; and the 1985 Proposed Policy Statement (Appendix F) lacked the requisite finality to be accorded *res judicata* effect. However, even if Allied were to be unsuccessful on each of these independent arguments, it still must prevail on the merits because the federal pre-emption of any jurisdiction of the Commission stands as an independent, threshold bar to the application of the doctrine of *res judicata.* Thus, regardless of the New York court's holding on the other grounds advanced by Allied (which determinations, it is submitted, were erroneous as well), its error on the pre-emption issue constitutes an overriding, independent error.

Application of the pre-emption doctrine, which has its roots in the Supremacy Clause of the United States Constitution, Article VI, clause 2, presents to this Court for determination a question of law. *Appalachian Power Co. v. Public Service Commission,* 630 F.Supp. 656 (S.D.W.Va. 1986), *aff'd,* 812 F2d 898 (4th Cir. 1987). As this Court stated in *Schneidewind v. ANR Pipeline Company,* 485 US ____, 99 LEd2d 316, 108 SCt 1145 (1988), with respect to such a determination:

> "The circumstances in which federal law pre-empts state regulation are familiar . . . A pre-emption question requires the examination of congressional intent . . . Of course, Congress explicitly may define the extent to which its enactments pre-empt state law . . . In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such purpose properly may be inferred where the pervasiveness

> of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where 'the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose.' . . . Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law." 485 US at ____, 99 LEd2d at 325; citations omitted.

As set forth above, it has been held that PURPA pre-empts most state action as respects cogeneration. FERC recently has narrowed further the area of permissible state action in *Orange and Rockland Utilities, Inc., supra,* which discussed generally the pre-emptive scope and nature of PURPA, citing to, *inter alia, Nantahala Power & Light Co. v. Thornburg,* 476 US 953, 90 LEd2d 943, 106 SCt 2349 (1986). Applying the pre-emptive effect of PURPA to the instant matter, it is beyond cavil that the Commission violated the doctrine and acted in disregard of PURPA's mandates, thus exceeding its jurisdiction and, according to New York law, precluding application of the doctrine of *res judicata* to its earlier determination. *See Matter of Consolidated Edison Co. v. Public Service Commission, supra,* 98 AD2d at 381; *Lane Construction Corp. v. Winona Construction Co., Inc.,* 49 AD2d 142, 373 NYS2d 882 (3d Dept. 1975); *Matter of Long Island Lighting Co. v. Horn,* 49 Misc2d 717, 268 NYS2d 366 (Sup. Ct., Suffolk Co. 1964); *see also, Commissioner of Labor v. Hinman,* 103 AD2d 886, 478 NYS2d 116 (3d Dept. 1984).

The record stands uncontradicted that the Commission was purporting to implement PURPA in: the 1981 Order (21 NYPSC 66); Order 82-10 (22 NYPSC 1858) (*see Mat-*

ter of Consolidated Edison Co. v. Public Service Commission, supra, 98 AD2d at 381, terming Order 82-10 the "culmination" of the implementation of PURPA); the 1985 Proposed Policy Statement (Appendix F); and the 1986 Policy Statement (26 NYPSC 293; Appendix G).

The Commission's ever-narrowing jurisdiction regarding PURPA limits it to acting only in accordance with the mandates of PURPA. The Commission recognized that this was the limit of its jurisdiction when, in the 1981 Order, it announced its intent to review contracts consistent with PURPA and the FERC regulations promulgated pursuant thereto. 21 NYPSC 66. In that same 1981 Order, the Commission conceded that the term "qualifying facility" is defined by federal law—section 201 of PURPA, 16 USC section 796 (Appendix H-1). *See also,* 16 USC section 824a-3(1) (Appendix H-10); 18 CFR Part 292, Subpart B (Appendix H-46). It therefore is demonstrably clear that the Commission does not have the power to redefine—retroactively or otherwise—the term "qualifying facility" by limiting it to "new capacity".

Moreover, the footnote in Order 82-10, at 22 NYPSC 1972, demonstrates beyond doubt that prior to the 1984 tariff filing, the Commission (and Niagara Mohawk) were well aware of the *potential* for distinguishing between qualifying facilities producing old and new capacity pursuant to the FERC regulations, yet the Commission declined to make such a distinction. In Order 82-10, after discussing the subject of "distinction", the Commission noted:

> "Qualifying facilities whose construction began before November 9, 1978 need not be paid purchase rates equal to a utility's avoided costs, but only if the state commission regulating that utility

> finds that a lower rate is 'sufficient to encourage cogeneration and small power production.' 18 CFR section 292.304(b)(3). No party has contended that such a finding is warranted in this case." *Id.*

Having expressly noted that there are qualifying facilities producing old and new capacity, and having rejected the need to distinguish between them, the Commission proceeded to direct all utilities to submit rates for purchases from, and sales to, *all* qualifying facilities. Niagara Mohawk's SC-6 and SC-7 tariffs resulted.

Although in 1982, even the Commission recognized that its jurisdiction did not encompass the ability to redefine PURPA terms, that did not stop it from doing so in the determination that was given *res judicata* effect below. In order to reach the result it desired, the Commission impermissibly engrafted a gloss upon the definition of "qualifying facility" two years after it accepted a tariff on its face applicable to the all-encompassing PURPA definition of "qualifying facility". By giving preclusive effect to that determination, the New York Court of Appeals effectively ignored the pre-emption doctrine and conceded to the Commission—in violation of the doctrine—the jurisdiction to rewrite the definitions contained in PURPA and the FERC regulations, a prohibited result that stands the pre-emption doctrine on its head.[11]

---

[11] *Cf., Matter of Trump—Equitable Co. v. Gliedman*, 62 NY2d 539, 546, 478 NYS2d 846, 467 NE2d 510 (1984); *Matter of Harbolic v. Berger*, 43 NY2d 102, 109, 400 NYS2d 780, 371 NE2d 499 (1977); *see Matter of Rosenbluth v. Finkelstein*, 300 NY 402, 91 NE2d 581 (1950) (holding that words mean precisely what they say, and an agency may not, under the guise of administering a statute, ascribe a different meaning to those words).

In this case, petitioner simply asks that the preclusive effect accorded the terms and conditions of PURPA by this Court and the highest courts of two states once again be respected. Throughout the proceedings below, petitioner has claimed the benefit of PURPA's terms and conditions to establish its cause of action. In every conceivable sense, petitioner has claimed a right, privilege or immunity established by federal law. The claimed protection of federal law, when denied, historically has provided an ample basis for exercise of this Court's appellate jurisdiction. *See, e.g., Sioux City Railroad Company v. Richmond,* 82 US 3, 21 LEd 118 (1873); *Nutt v. Knut,* 200 US 12, 50 LEd 348, 26 SCt 216 (1906); *Wabash Railroad v. Pearce,* 192 US 179, 48 LEd 397, 24 SCt 231 (1904); *Merchants' National Bank v. Wehrmann,* 202 US 295, 50 LEd 1036, 26 SCt 613 (1906). The exercise of such jurisdiction is equally appropriate here.

2. The question at issue relates directly to the extent of the jurisdiction of state regulatory bodies to implement PURPA. It is an important question—both in this specific context and in the broader context of federalism—that should be settled by this Court.

The decision below cuts directly against the grain of the body of decisional law that has recognized the principle of the pre-emptive effect of PURPA and that has sought to refine that principle in a manner that limits the permissible scope of state regulatory activity so as to preserve the integrity and fabric of the nationwide regulatory scheme as envisioned by PURPA. That congressional scheme envisioned PURPA as the necessary, broad, *national* response to the energy crisis. See *Consolidated Edison Co. of N.Y., Inc. v. Public Service Commission of New York,* 470 US 1075, 85 LEd2d 132, 105 SCt 1831 (1985) (White, J., dissenting and citing to *FERC v. Mississippi,* 456 US

742, 750, 72 LEd2d 532, 102 SCt 2126 [1982]). In such circumstances, the need for uniform standards and terminology is appropriate, if not imperative. *Cf., City of New York v. Federal Communications Commission, supra.*

If permitted to stand, the decision below effectively destroys the necessary concomitant of the congressional intent that there be such a national policy—uniformity of regulatory application. Here, petitioner rightfully sought to rely on the law as written. The court below held such reliance meaningless when it gave preclusive effect to a change in PURPA by a body not authorized to make such a change. The precedent set by that decision is such that cogenerators, such as petitioner, and even utilities, such as respondent Niagara Mohawk, cannot rely on contracts, tariffs or regulations employing PURPA terms because those terms have no fixed meaning. The decision effectively renders them hollow vehicles—their meaning to be fleshed out by state regulatory commissions as they see fit. By reason of the decision below, PURPA no longer is the polestar Congress intended. Rather, parties must look to the latest Commission redefinition of PURPA terms and hope that the Commission does not further confuse matters—as it did here—by redefining such terms retroactively.

The chaos of such a system—effectively enabling the establishment of 50 state PURPA's—is self-evident. No longer would administrative regulations have the force of law (*see Nat'l Assoc. of Pharmaceutical Manufacturers v. Department of Health and Human Services,* 586 F.Supp. 740 [S.D.N.Y. 1984]), binding administrative agencies as well as all others (*Smith v. Resor,* 406 F2d 141 [2d Cir. 1969]). No longer would utility tariffs have the force of law (*see Sisters of St. Dominic v. Orange and Rockland Power Co.,* 79 AD2d 1021, 435 NYS2d 332 [2d Dept.

1981]; *Lee v. Consolidated Edison Co.*, 98 Misc2d 304, 413 NYS2d 826 [App. T., 1st Dept. 1978]) because they could be redefined retroactively at the whim of the Commission. No longer would there be any operative effect to the normal principle of contractual interpretation incorporating into every contract the law in force at the time of agreement (*see, e.g., Dolman v. United States Trust Co.*, 2 NY2d 110, 157 NYS2d 537, 138 NE2d 784 [1956]; 22 *NY Jur 2d,* Contracts, section 202) because that law would be subject to constant, retroactive redefinition by a body not authorized to do so.

Such chaos was not the intent of Congress, and the particular evil here present is prohibited by the Supremacy Clause of the United States Constitution (Appendix H-1). Although PURPA uses the states to implement its goals, it provides terms and guidelines that must be adhered to in order to accomplish those goals. This case affords to this Court an excellent opportunity to provide further rationality and uniformity to the often inconsistent approach taken to implementation of PURPA in the 50 states (*see, e.g., Lock & Van Kuiken,* "Cogeneration and Small Power Production: State Implementation of Section 210 of PURPA", 3 *Solar L Rep* 659 [1981]).

In promulgating regulations pursuant to PURPA, FERC sought to buttress qualifying cogenerators' ability to negotiate with utilities through the rights and protections afforded by the regulations it promulgated. 45 Fed. Reg. 12,217 (1980). The decision below frustrates the rights FERC sought to strengthen and the implementation of the federal scheme no less than in the analogous situation that arose in *McCarty v. McCarty,* 453 US 210, 69 LEd2d 589, 101 SCt 2728 (1981), in which this Court concluded that it should exercise its appellate jurisdiction. The same conclusion is warranted here.

Conclusion

For the reasons set forth, it is respectfully submitted that the petition for certiorari should be granted. In the alternative, it is respectfully requested that this Court reverse and remand this case to the New York Court of Appeals for a determination of whether PURPA precludes application of the doctrine of *res judicata* to the decision of the New York Public Service Commission.

Respectfully submitted this 5th day of October, 1988.

PAUL A. FEIGENBAUM*
LAWRENCE H. COOKE
THOMAS A. GRUE
COUCH, WHITE, BRENNER, HOWARD
& FEIGENBAUM
Of Counsel
Attorneys for Petitioner

*Counsel of Record

APPENDIX A—Allied Chemical v. Niagara Mohawk Power Corp., 72 NY2d 271, ____NYS2d____ (1988).

State of New York.

COURT OF APPEALS

4 No. 182

ALLIED CHEMICAL, an Operating Unit of Allied Corporation,

Appellant,

v.

NIAGARA MOHAWK POWER CORPORATION *et al.*,

Respondents.

Paul A. Feigenbaum, Albany, for appellant.

Leon A. Allen, Jr., NY City, & Gary J. Lavine, Syracuse, for respondent NIMO.

Marilyn Mann Faulkner & Robert A. Simpson, Albany, for respondent PSC.

WACHTLER, Ch. J.:

In this contract action plaintiff, Allied Chemical, alleges that defendant, Niagara Mohawk Power Corporation (NIMO), has not fully paid for electricity it agreed to purchase from plaintiff. The dispositive issue in this dispute, however, unlike *Staatsburg Water Co. v Staatsburg Fire District* (___ NY2d

____ [decided today]), was fully, fairly and conclusively litigated by these parties, at their request, in a quasi-judicial proceeding before the Public Service Commission (PSC), thereby precluding relitigation of the issue in this action.

The Public Regulatory Policies Act of 1978 (PURPA) (16 USC § 2601 et seq) and the regulations of the Federal Energy Regulatory Commission (*see* 18 CFR §§ 292.303, 292.304) require that regulated utilities purchase electricity from certain alternative generators of electricity known as "qualifying cogenerating facilities". The rate paid by the utility for the electricity depends upon the date of commencement of construction of the cogenerating facility. Cogenerators for which construction commenced after November 9, 1978 are "new capacity" and receive payment at a rate at least equal to full avoided costs,[1] while facilities for which construction commenced before that date are "old capacity", and the payment rate may be less than full avoided costs, subject to the determination of the state regulatory authority (18 CFR § 292.304[b][2-3]).

Allied Chemical owns an old capacity qualifying cogeneration facility located in Solvay, New York. In 1981 it entered into a contract with NIMO, a regulated utility, for the sale of electricity from the Solvay cogenerator at a rate less than full avoided costs. The contract provided, however, that "either party may elect to replace the price for energy as specified above with the applicable rate specified by the [PSC] * * * either in a general tariff approved by the [PSC] * * * or upon petition by either party to this agreement."

On May 12, 1982, the PSC issued opinion No. 82-10, requiring electric utilities, including NIMO, to file tariff leaves reflecting payment for cogenerated electricity at full avoided costs. NIMO then filed a new tariff, which became effective on February 20, 1984. On March 20, 1984, Allied Chemical advised NIMO that the new tariff was an "applicable rate" under

[1] "Avoided costs" is defined as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source" (18 CFR § 292.101[b][6]).

the contract, and that Allied Chemical elected to receive this new rate for the sale of electricity from its Solvay cogenerator.

NIMO then filed a petition with the PSC, under section 204 of the State Administrative Procedure Act, seeking a declaratory ruling that the new tariff did not apply to old capacity cogenerators, and thus did not constitute an "applicable rate" under the contract. Allied Chemical responded by filing a counterpetition and complaint with the PSC, alleging that the tariff did cover old capacity cogenerators, and that as a result it could elect to receive full avoided costs for its sale of electricity to NIMO.

The PSC considered the parties' claims in the context of its more general proceedings to implement PURPA; in a single proceeding the PSC considered not only the question of whether the new tariff constituted an "applicable rate" under the contract, but also, generically, whether in the future old capacity generators should be entitled to receive payment at the full avoided costs rate. The PSC then issued two statements. The first, dated January 22, 1985, held that the new tariff did not include old capacity cogenerators, and thus Allied Chemical could not elect to receive the new tariff rate under the contract. In that ruling the PSC also suggested that a ten year phrase in of a full avoided cost rate for old capacity cogenerators may be appropriate, and solicited comments on the issue. On February 14, 1986, afterr receiving comments on the proposal, the PSC issued a second statement, formally adopting a 10 year phrase in of a full avoided cost rate for old capacity cogenerators.

Allied Chemical did not seek article 78 review of either PSC ruling. It did, however, commence the present contract action, seeking payment at the full avoided costs rate from March 20, 1984, the date of the alleged election under the contract, and February 14, 1986, the date on which the PSC allowed a phase in of the full avoided costs rate. NIMO then moved for summary judgment, primarily on *res judicata grounds*. Before deciding the motion, the trial court directed that the PSC be added as a party, and the PSC was served with a summons and amended complaint on July 30, 1986. The PSC then also moved for summary judgment, on *res judicata* and statute of

limitations grounds. The trial court granted the motions of NIMO and PSC, dismissing Allied Chemical's complaint, and the Appellate Division affirmed. We now also affirm.

The elements necessary in all cases for issue preclusion are well known. It is required that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue (*Schwartz v. Public Administrator,* 24 NY2d 65, 71; *Ryan v. New York Telephone Co.,* 62 NY2d 494, 500-502). While issue preclusion may arise from the determinations of administrative agencies, in that context the doctrine is applied more flexibly, and additional factors must be considered by the court (*cf. Staatsburg Water Comp. v. Staatsburg Fire District,* ____ NY2d ____ [decided today]). These additional requirements are often summed up in the beguilingly simple prerequisite that the administrative decision be "quasi-judicial" in character (*see, e.g., Ryan v. New York Telephone Co., supra,* at 500; *Bernstein v. Birch Wathan School,* 71 AD2d 129, 132, *aff'd* 51 NY2d 932). However, the determination of whether an agency proceeding was "quasi-judicial" actually involves a multi-faceted inquiry.

First, the court must make the threshold determination that the agency has the statutory authority to act adjudicatively. If the agency has such authority, the court must then ascertain whether the procedures used in the administrative proceeding assured that the information presented to the agency were sufficient both quantitatively and qualitatively, so as to permit confidence that the facts asserted were adequately tested, and that the issue was fully aired (*see, Brugman v. City of New York,* 64 NY2d 1011, 1012; *Ryan v. New York Telephone Co., supra,* 498; 4 Davis, Administrative Law Treatise, § 21:3 [2nd ed. 1983]; Restatement [Second] of Judgments § 83). Additionally, the expectation of the parties is important in determining the fairness of applying issue preclusion in a particular case; thus, a party explicitly soliciting resolution of an issue from an agency, who fully participates in the administrative proceeding which follows with the expectation that all will be bound by the result reached there, may be fairly precluded

from relitigating the issue in a subsequent proceeding (*see, Staatsburg Water Co. v. Staatsburg Fire Dist., supra).* The court must look at the overall context of the agency's decision to assess whether according a preclusive effect to a particular agency determination is consistent with the agency's scheme of administration; for example, the agency's need for flexibility, and its need to modify prior determinations in order to adapt its policy to changing conditions, may counsel against applying issue preclusion to a particular administrative decision (*see, Matter of Venes v. Community School Bd.,* 43 NY2d 520, 525; *Second Taxing District of City of Norwalk v. Federal Energy Regulatory Commn.,* 683 F2d 47, 484.

Applying these factors and considerations to the case now before us, we conclude that a preclusive effect is properly accorded to the PSC's determination that the new tariff was not an "applicable rate" under the contract. First, there can be no doubt that it is within the PSC's statutory mandate to act adjudicatively (*see, Long Island Lighting Co. v. Transamerica Delaval,* 646 F Supp 1442).

In addition, there is no dispute that the issue before the PSC of whether the new tariff was an "applicable rate" is identical to the issue that Allied Chemical seeks to litigate in this action. Nor can there be any dispute that the PSC answered this precise question in the negative. Allied Chemical also does not contest that it had a full and fair opportunity to controvert this issue before the PSC, or suggest how procedurally the manner in which this issue would be resolved by a court would vary from the PSC's determination, except for the different personages of the decisionmakers. Finally, Allied Chemical does not assert that giving preclusive effect to the PSC's determination would be unfair, or was in any way unexpected; in fact, Allied Chemical, with full knowledge of PSC procedures, unequivocally requested and received a dispositive ruling from the PSC on the very issue it seeks to litigate here. Nevertheless, Allied Chemical does argue, relying upon *Matter of Consumer Protection Bd. v. Public Service Commission* (97 AD2d 320), that the PSC's decision was a "rate-making", and therefore "legislative" as opposed to "quasi-judicial" in nature, and that

as a result the operation of issue preclusion here would be inconsistent with the PSC's scheme of administration.

In *Consumer Protection Bd. v. Public Service Commission (supra)*, the Appellate Division held that when the PSC determines an issue solely for the purpose of prospectively setting a utility's rates, relitigation of the issue in a subsequent proceeding is proper because the PSC's ratemaking decisions are "legislative", as opposed to "quasi-judicial", in character. A number of courts have reached a like conclusion (*see, e.g., Second Taxing District of City of Norwalk v. Federal Energy Regulatory Commission*, 683 F2d 477, 484; *Long Island Lighting Co. v. Transamerica Delaval*, 646 F Supp 1442, 1450-1451; *International Telephone & Telegraph Corp. v. American Telephone & Telegraph*, 444 F Supp 1148, 1156-1157). The conclusion in these cases does not, however, appear to be based on the informality of the procedures used in a ratemaking proceeding; indeed, the PSC's ratemaking proceedings often involve formal hearings, complete with the calling and cross examination of witnesses, and other adjudicative-type procedural safeguards (*see, e.g., Matter of National Fuel Gas Distribution Corp. v. Public Service Commission*, 86 AD2d 901, 902; *New York Tel. Comp. v. Public Service Commission*, 59 AD2d 17, 19; *see also* Public Service Law § 66 [12]). Instead, issue preclusion has not been applied to ratemaking proceedings because the reasonableness of a rate depends upon economic conditions, and numerous policy considerations, all of which invariably change over time, requiring that a utility's rate be susceptible to reconsideration (*Second Taxing District of City of Norwalk v. Federal Energy Regulatory Commission, supra*, 484). Because a ratemaking agency must be free to reassess the reasonableness of rates, it would be illogical, and inconsistent with the agency's function, to give preclusive effect to a prior ratemaking determination, and courts have refused to do so (*see, id.; Long Island Lighting Co. v. Transamerica Delaval, supra; see also, Matter of Venes v. Community School Bd., 43 NY2d 520, 525).*

According a preclusive effect to the disputed issue in this case, however, does not implicate these concerns. Here the PSC made a specific determination of whether a particular tar-

iff in fact applied to old capacity cogenerators, and thus was an "applicable rate" under the contract at issue. This was not a prospective ratemaking, or other type of policy decision that could be susceptible to reassessment in light of changing circumstances. On the contrary, it was a squarely defined controversy over the failure to pay fully under a contract for electricity delivered in the past, and called for a conclusive and final disposition. Therefore it would not be inconsistent with the PSC's need for flexibility in making policy determinations to accord preclusive effect to the agency's decision here. In the case before us, the parties voluntarily went to the PSC in order to obtain a dispositive ruling in this matter, that is what they received from the PSC, and that is the effect that the determination will be given by the court in this separate action.

Finally, it should also be noted that the lower courts properly declined to convert the present action into an article 78 proceeding to review the PSC's determination, because this action was not commenced against the PSC within the four month limitations period (*see* CPLR § 217).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Order affirmed with costs. Opinion by Chief Judge Wachtler. Judges Simons, Kaye, Alexander, Titone and Bellacosa concur. Judge Hancock took no part.

Decided July 7, 1988

APPENDIX B—Order on Remittitur of New York State Court of Appeals in Allied Chemical v. Niagara Mohawk Power Corp.

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding

4 No. 182

ALLIED CHEMICAL, an Operating Unit of Allied Corporation,

Appellant,

v.

NIAGARA MOHAWK POWER CORPORATION *et al.*,

Respondents.

The appellant in the above entitled appeal appeared by White, Brenner and Feigenbaum, Esqs.; the respondents appeared by LeBoeuf, Lamb, Leiby and MacRae, Esqs.; Robert A. Simpson, Esq., Acting Counsel, Public Service Commission; and Gary J. Lavine, Esq., General Counsel, Niagara Mohawk Power Corporation.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Chief Judge Wachtler. Judges Simons, Kaye, Alexander, Titone and Bellacosa concur. Judge Hancock took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Onondaga County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHERAW
Clerk of the Court
Court of Appeals, Clerk's Office, Albany, July 7, 1988

APPENDIX C—Allied Chemical v. Niagara Mohawk Power Corp., 129 AD2d 233, 517 NYS2d 635 (4th Dept. 1987).

SUPREME COURT, STATE OF NEW YORK,

APPELLATE DIVISION—FOURTH DEPARTMENT.

ALLIED CHEMICAL, an operating unit of Allied Corporation,

Appellant,

v.

NIAGARA MOHAWK POWER CORPORATION and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

#450/87

Argued: April 30, 1987

Decided: July 10, 1987

Present:

Hon. John J. Callahan, Justice Presiding.
Hon. M. Dolores, Denman,
Hon. James H. Boomer,
Hon. John P. Balio,
Hon. John F. Lawton, Associate Justices.

Appeal from Order of Supreme Court, Onondaga County, Miller, J.—Dismiss complaint—summary judgment.
Appearances:

White, Brenner & Feigenbaum, Esqs., One Steuben Place, Albany, New York 12201, Attorneys for Appellant (Paul Feigenbaum, Esq., of counsel)

Lebouef, Lamb, Leiby & McCrae, Esqs., 150 State Street, Albany, New York 12207, Attorneys for Respondent Niagara Mohawk Power Corp. (Leon Allen, Esq., of counsel)

David E. Blabey, Esq., 3 Empire Plaza, Albany, New York 12223, Attorney for Respondent Public Service Commission of the State of New York (Marilyn Faulkner, Esq., of counsel)

BALIO, J.:

Allied Chemical operated an electric generating facility for use in operating its manufacturing plant in Solvay, New York. The facility was constructed prior to 1978, and is considered an "old capacity" facility for purposes of the Public Utility Regulatory Policies Act of 1978 (PURPA) (16 USC §2601 *et seq.*) and implementing regulations (18 CFR §292.304). In its proceedings to implement PURPA, the Public Service Commission (PSC) directed all utilities to include a provision in their contracts for the purchase of electricity from cogeneration facilities permitting such facilities to elect to be paid under the contract price, under any general tariff approved by the PSC or at a rate approved by the PSC upon petition. Niagara Mohawk Power Corp. (NIMO) entered into a contract with Allied Chemical in 1981 for the purchase of electricity, and the contract included the provision permitting Allied Chemical to elect to be paid pursuant to a general tariff.

In a separate rate proceeding, the PSC ordered various utilities to file proposed tariffs for the purchase of power from cogeneration facilities at full avoided costs. NIMO filed its proposal, which was approved by the PSC effective February 20,

1984. Allied Chemical then elected to be paid under the rate provided in the approved tariff. NIMO refused and filed with the PSC a petition for a declaratory ruling that its tariff was not applicable to contracts with "old capacity" cogeneration facilities. Allied filed a counterpetition. Without any hearing, the PSC treated the petitions as a rate proceeding in the context of its proceedings for the implementation of PURPA. The PSC then issued a ruling and Proposed Policy Statement which determined that the NIMO tariff did not apply to the Allied Chemical contract but that "old capacity" facilities should be entitled to payment according to avoided costs. Further comment was invited. On February 14, 1986, the PSC issued its Final Policy Statement adopting its earlier proposal and providing for a ten-year phase-in of the full avoided costs rate.

Allied Chemical did not institute an Article 78 proceeding to review either the initial ruling or the final policy statement although that remedy is statutorily authorized (State Administrative Procedure Act [SAPA], §205). Instead, Allied instituted an action against NIMO for breach of contract, seeking the difference between the contract rate and the tariff rate. NIMO moved to dismiss upon the ground, *inter alia*, of *res judicata*. The court directed that the PSC be added as a party and following service of an amended complaint and answer, the PSC moved for summary judgment of dismissal upon the grounds of *res judicata* and statute of limitations. The court granted both motions, and we affirm.

The determination of an administrative agency is entitled to collateral estoppel effect if it is a quasi-judicial determination rendered pursuant to the agency's adjudicatory authority to decide cases (*Ryan v New York Tel. Co.*, 62 NY2d 434, 499). If the determination is made in the exercise of rulemaking power, it is not an adjudication and is not entitled to *res judicata* or collateral estoppel effect (*Matter of Venes v. Community School Bd. of Dist.* 26, 43 NY2d 520, 525). There is no dispute that the PSC determination was not made in the context of a adjudicatory proceeding as defined by statute (SAPA, Article 3); it was made pursuant to SAPA, §204, which is contained in Article 2 entitled "Rule Making." Nevertheless, we are persuaded that the manner in which the Allied Chemical-NIMO

dispute was resolved was adjudicatory in nature and that collateral estoppel should apply.

Section 204 of SAPA authorizes an agency to issue a declaratory ruling on the application of any rule or statute enforceable by that agency to a particular state of facts. Pursuant to this section, Allied Chemical and NIMO asked the PSC to determine whether the tariff approved by the PSC applied to their contract. The nature of this proceeding was quite similar to a declaratory judgment action under CPLR 3001, and the procedure employed was akin to summary judgment motion in such an action. There was no dispute regarding the underlying facts; only the legal implications of those facts were contested. "Where an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication. Decisional processes using procedures whose formality approximates those of courts may properly be accorded the conclusiveness that attaches to judicial judgments" (Restatement, Judgments 2d, §83, comment b, p 268). Allied Chemical has made no claim that it was denied a full and fair opportunity to litigate the issue of the application of the tariff rate. The PSC determination was quasi-judicial in nature, and we conclude that it should be given collateral estoppel effect.

Although the PSC determination may not be collaterally attacked, a direct attack by an Article 78 proceeding could be maintained (Restatement, Judgments 2d, §83, comment a, p 267). Moreover, this court has the discretionary power to convert a plenary action to a special proceeding (*Gertler v. Goodgold,* 107 AD2d 481, 487, *affd* 66 NY2d 946). Exercise of our discretion is not warranted in this case because an Article 78 proceeding, to which the PSC must be made a party (SAPA, §205), would be time-barred as to the PSC (*see, Gertler v. Goodgold,* 107 AD2d 481, 487, *supra; Tabolt v. KMZ Enterprises,* 52 AD2d 995, *affd* 43 NY2d 687).

Accordingly, the order should be affirmed.

Callahan, J.P., Denman, Boomer and Lawton, JJ. concur.

APPENDIX D—Order of New York State Supreme Court, Appellate Division, Fourth Department, in Allied Chemical v. Niagara Mohawk Power Corp.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT.

Present:

Callahan, J.P., Denman, Boomer, Balio, Lawton, JJ.

ALLIED CHEMICAL, an Operating unit of Allied Corporation,

Appellant,

v.

NIAGARA MOHAWK POWER CORPORATION and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

The above named Allied Chemical, an operating unit of Allied Corporation having appealed to this Court from an order of the Supreme Court, entered in the Onondaga County Clerk's office on October 21, 1986 and said appeal having been argued by Paul Feigenbaum of counsel for appellant, Leon Allen of counsel for respondent Niagara Mohawk, Marilyn Faulkner of counsel for respondent, Public Service Commission and due deliberation having been had thereon.

It is hereby ORDERED, That the order so appealed from be and the same hereby is unanimously affirmed without costs.

Opinion by Balio, J., which is hereby made a part hereof.

Entered: July 10, 1987

CARMEN S. LEONE
Clerk

APPENDIX E—Order of New York State Supreme Court, Onondaga County, in Allied Chemical v. Niagara Mohawk Power Corp.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ONONDAGA

ALLIED CHEMICAL, an Operating Unit of Allied Corporation,

Plaintiff,

against

NIAGARA MOHAWK POWER CORPORATION and NEW YORK PUBLIC SERVICE COMMISSION.

Defendants.

Index No. 86-3224
RJI No. 33-86-1766

Hon. Donald H. Miller, Justice.

Defendant Niagara Mohawk Power Corporation, having moved for an order dismissing the Complaint pursuant to CPLR 3211 and defendant New York Public Service Commission, having moved for an order dismissing the amended complaint and directing that summary judgment be entered in favor of defendant New York Public Service Commission, and these motions having duly come on to be heard in the Supreme Court of New York, Onondaga County, on September 18, 1986;

NOW upon reading the Notice of Motion to dismiss the complaint, dated May 29, 1986; the Affidavit of John W. Dax,

sworn to on May 28, 1986, in support of the motion to dismiss the complaint; the Memorandum of Law in support of the motion to dismiss the complaint; the Notice of Motion to dismiss the amended complaint and direct summary judgment in favor of defendant New York Public Service Commission, dated September 5, 1986; the Affidavit of David E. Blabey, sworn to on September 5, 1986, in support of the motion for summary judgment, together with the exhibits annexed thereto; the Memorandum of Law in support of the motion for summary judgment; the Affidavit of James W. McTarnaghan, sworn to on June 19, 1986, in opposition to the motion to dismiss the complaint, together with the exhibits annexed thereto; the affidavit of James W. McTarnaghan, sworn to on September 12, 1986, in opposition to the motion for summary judgment, together with the exhibits annexed thereto; the Memorandum of Law in opposition to the motion to dismiss the complaint; the Memorandum of Law in opposition to the motion for summary judgment; the Reply Affidavit of John W. Dax, sworn to on August 15, 1986; the Memorandum of Law in reply to the Memorandum of Law in opposition to the motion for summary judgment; and after hearing John W. Dax, counsel for defendant Niagara Mohawk Power Corporation, in support of the motion to dismiss the complaint; Glenn D. Haake, counsel for defendant New York Public Service Commission, in support of motion for summary judgment; and James W. McTarnaghan, attorney for the plaintiff Allied Chemical, in opposition thereto, and due deliberation having been had, it is

ORDERED that the motion of defendant Niagara Mohawk Power Corporation to dismiss the complaint and the motion of defendant New York Public Service Commission to dismiss the amended complaint and direct judgment in favor of the defendant New York Public Service Commission are hereby granted.

DATED: Syracuse, N.Y.,
Oct. 10, 1986.

HON. DONALD H. MILLER
Justice, Supreme Court
Onondaga County

APPENDIX F—New York State Public Service Commission Ruling with Respect to the Niagara Mohawk-Allied Dispute and Proposed Policy Statement Applicable to Qualifying Facilities that Provide Old Capacity (Issued: January 22, 1985).

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 27824—Proceeding regarding Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978.

Petition of Niagara Mohawk Power Corporation for a declaratory ruling regarding purchase rates for qualifying facilities construction of which commenced prior to November 9, 1978 and counterpetition and complaint of Allied Chemical for a declaratory ruling.

NOTICE

(Issued: January 22, 1985)

At its session of January 9, 1985, the Commission decided to invite comment on a proposed policy statement concerning purchases by electric utilities from certain qualifying cogeneration facilities. The proposal was included in a ruling resolving a dispute presented by Niagara Mohawk Power Corporation and Allied Chemical (an operating unit of Allied Corporation).

A copy of the ruling and proposed policy statement is attached. Any party wishing to comment on the proposal should submit 25 copies of its brief to John J. Kelliher, Secretary, New York State Public Service Commission, Three Empire State Plaza, Albany, New York 12223 to be received on or before March 22, 1985.

JOHN J. KELLIHER
Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission
held in the City of Albany on January 9, 1985

Commissioners Present:

Paul L. Gioia, Chairman
Edward P. Larkin
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead
Rosemary S. Pooler

CASE 27824—Proceeding regarding Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978.

Petition of Niagara Mohawk Power Corporation for a declaratory ruling regarding purchase rates for qualifying facilities construction of which commenced prior to November 9, 1978 and counterpetition and complaint of Allied Chemical for a declaratory ruling.

RULING WITH RESPECT TO THE NIAGARA MOHAWK-ALLIED DISPUTE AND PROPOSED POLICY STATEMENT APPLICABLE TO QUALIFYING FACILITIES THAT PROVIDE OLD CAPACITY

(Issued: January 22, 1985)

BY THE COMMISSION:

INTRODUCTION

By petition dated April 5, 1984, Niagara Mohawk Power Corporation (Niagara Mohawk) has requested that we issue a ruling regarding the implementation of Section 210 of the Public Utility Regulatory Policies Act (PURPA) as it pertains to

the purchase rates to be paid to qualifying facilities construction of which commenced prior to November 9, 1978. This request results from a dispute that developed between Niagara Mohawk and Allied Chemical (Allied) concerning the purchase rates applicable to its cogeneration facility in the Town of Geddes not that Niagara Mohawk has implementted tariff rates for customers with on-site generating facilities.

In October of 1981, Niagara Mohawk entered into a purchase power agreement with Allied. Under the terms of this agreement, Allied receives Niagara Mohawk's avoided fuel costs for the energy it delivers. The agreement also contains the following provision:

> . . . It is further provided that either party may elect to replace the price for energy as specified [in the agreement] with an applicable rate specified by the New York State Public Service Commission either in a general tariff approved by the Commission or upon petition by either party to this agreement.

In March of 1984, Allied notified Niagara Mohawk that it considered the company's newly implemented tariff rates for the purchase of electric energy and capacity from customers with on-site generating facilities—Service Classification No. 6—as an applicable rate under the purchase power agreement and it sought to exercise the option clause contained in the agreement.[1] Niagara Mohawk disagreed with Allied's conclusion that S.C. No. 6 is applicable to its cogeneration facility and the company thereafter filed its petition which requests that we address three matters:

1. Must Niagara Mohawk pay Allied a price or rate based on the company's avoided cost as provided in S.C. No. 6 or at some lesser price?
2. What general criteria should Niagara Mohawk apply, if any, to persons who own qualifing facilities

[1]Allied also sought to switch its backup service classification from S.C. No. 2 to Niagara Mohawk's new backup service rate for on-site generators—S.C. No. 7.

the construction of which commenced prior to November 9, 1978 in determining the price or rate to be paid for electricity sold to the company from such facilities or should such matters be determined on a case-by-case basis?

3. Should Allied continue to receive backup service under S.C. No. 2 or should it be provided backup service under S.C. No. 7?

By counterpetition and complaint dated June 19, 1984, Allied claims that it is entitled to elect the S.C. No. 6 rate under the terms of the purchase power agreement and it requests that we issue a declaratory ruling stating that all qualifying facilities in New York are entitled to payment of full avoided costs.

In addition to Niagara Mohawk's petition and Allied's counterpetition, we have received comments on behalf of three firms that operate either cogeneration or small power production facilities in New York—Bethlehem Steel Corporation (Bethlehem Steel), Occidental Chemical Corporation (Occidental), and Boise Cascade Corporation (Boise). These firms believe that a ruling with respect to the Niagara Mohawk-Allied dispute could have an effect on the rates Niagara Mohawk would pay for electricity purchased from their respective facilities. Their comments proffer various arguments in support of Allied's position that all qualifying facilities should receive full avoided costs.

DISCUSSION

In February of 1980, the Federal Energy Regulatory Commission (FERC) issued rules and regulations implementing Section 210 of PURPA.[1] For purposes of establishing purchase rates for qualifying facilities, the FERC regulations distinguish "old" from "new" capacity. New capacity—qualifying facilities commenced on or after November 9, 1978—are to receive purchase rates equal to full avoided cost.[2] With respect to old capacity—qualifying facilities initiated before November 9,

[1] 18 C.F.R. Part 292; 45 Fed. Reg. 12214, *et seq.*

[2] 18 C.F.R. § 292.304 (b)(2)

1978—the FERC regulations provide state regulatory authorities discretion to set purchase rates at less than the avoided costs[3] if the state regulatory authority determines that a lower rate would be just and reasonable to the electric consumers of the utility and in the public intererst;[4] would not discriminate against qualifying facilities;[5] and would be sufficient to encourage cogeneration and small power production.[1]

In several proceedings, we have issued decisions and rulings in which we specified the approach that would be used to develop on-site generation rates. However, before the filing of Niagara Mohawk's petition, we did not have occasion to address the specific issue of whether old capacity, as defined by FERC, would be entitled to full avoided cost rates. Thus, we consider as a matter of first impression whether we should require full avoided cost rates for old capacity.

The comments in opposition to Niagara Mohawk's petition claim that any decision to apply less than full avoided costs to old capacity would be contrary to State policy designed to encourage development of alternate energy production, cogeneration and small hydro facilities and that Section 66-c of the Public Service Law has been interpreted by us as requiring that full avoided costs be provided for all on-site generation, including old capacity.

Section 66-c of the Public Service Law does not mandate that full avoided costs be used to establish purchase rates for facilities that provide old capacity. The explicit ratemaking standard in this section is that purchase rates shall be established under such terms and conditions as we find are just and economically reasonable to ratepayers, nondiscriminatory to cogenerators, small hydro and alternate energy producers and furthers the public policy embodied in Section 66-c. And, the minimum sales price for purchased electricity *from any facility developed on or after June 26, 1980* shall be at least six cents per kilowatt-hour. We have not in any of our previous deci-

---

[3]18 C.F.R. § 292.304 (b)(3).
[4]18 C.F.R. § 292.304(a)(1)(i).
[5]18 C.F.R. § 292.304 (a)(1)(ii).
[1]18 C.F.R. § 292.304 (b)(3).

sions and rulings implementing this provision determined that all facilities are necessarily entitled to purchase rates equal to full avoided costs by virtue of State law or policy.

The primary issue presented by the Niagara Mohawk-Allied dispute is whether the purchase rates embodied in S.C. No. 6 are applicable to qualifying facilities commenced prior to November 9, 1978. There is no question that the Niagara Mohawk tariff rates are available to all qualifying facilities commenced on or after this date; however, we must determine under what circumstances we would consider allowing old capacity to receive the benefit of tariff rates, such as Niagara Mohawk's, that are developed on the basis of the utility's full avoided costs.

Owners and operators of such facilities who seek full avoided cost based rates will be required to demonstrate that such rates are necessary to remain viable or to increase output. In attempting to make any such demonstration, such owners and operators are free to attempt to show, if they so choose, that their costs of production have risen so as to render any previous rate insufficient to cover production costs, or to permit a reasonable return, or that their failure to receive full avoided costs for the entire output of a facility would not provide a sufficient incentive to continue to produce electric power. Utility companies opposing the payment of full avoided costs will be required to support their basis for believing that a lower rate would be consistent with the standards set forth in Section 66-c of the Public Service Law.

While we are preserving our right to determine on a case-by-case basis whether individual qualifying facilities providing old capacity should currently receive full avoided cost based purchase rates, we recognize that, over time, such facilities will require maintenance and repairs in order to continue operations. We, therefore, believe that it would be desirable to establish a schedule and time frame within which such facilities would automatically be allowed to receive purchase rates that would increase over time to the level of full avoided costs.

Staff has recommended that a qualifying facility providing old capacity be allowed, either at the end of any existing purchase contract or when permitted by an express provision in an

existing agreement, to begin to receive a rate that would, at the end of a ten-year period, reach full avoided costs. This rate would begin at the greater of either the rate the facility was receiving under its contract or 50% of full avoided costs. Each year, this rate would increase by one-tenth of the difference between the beginning rate and full avoided costs. For example, the purchase rate in the third year of the phase-in period for a particular facility which was initially receiving 50% of full avoided costs would be 65% of such costs.

We believe that this phase-in mechanism could provide qualifying facilities producing old capacity an alternative procedure for receiving full avoided cost based rates within a reasonable period of years without their having to demonstrate that such rates are needed immediately and we will, therefore, issue the staff recommendation for public comments.

With respect to the Niagara Mohawk-Allied dispute and the option clause contained in their purchase power agreement, our 1981 Order required the inclusion of such provisions in long-term contracts with qualifying facilities that are entitled to full avoided cost tariff rates pursuant to FERC's rules and regulations implementing Section 210 of PURPA. Utilities were not required to include this provision in any other contracts or under any other circumstances. Without a specific determination by us that Allied, as a provider of old capacity, is entitled to full avoided costs, the S.C. No. 6 tariff would not apply to the Niagara Mohawk-Allied contract. Nonetheless, with respect to Staff's proposed phase-in mechanism, Allied (and any other qualifying facility providing old capacity that entered into a similar agreement containing an option provision) would be allowed to begin to receive purchase rates pursuant to the staff proposal outlined above as soon as a tariff reflecting this mechanism is implemented by Niagara Mohawk.

With respect to the Niagara Mohawk-Allied dispute as to whether Allied should be provided backup service under S.C. 2 or S.C. 7, all cogenerators and small power producers have the option of selecting backup service under either the new S.C. 7 tariff or the tariff rates that are otherwise applicable to their respective service classifications.

Finally, in response to Occidental Chemical's concerns about its ability to continue to receive the level of purchase payments it is currently receiving from Niagara Mohawk, we have specifically ruled that this firm should receive payments based on full avoided costs and we continue to believe that such rates should apply to its Niagara Falls cogeneration facility.

The Commission Rules and Declares:

1. Parties desiring to file comments on the advisability of adopting the phase-in mechanism proposed by staff are invited to do so by submitting 25 copies to JohnJ. Kelliher, Secretary, New York State Public Service Commission, Three Empire State Plaza, Albany, New York 12223, to be received on or before March 22, 1985.

2. In addition to any comments that the Niagara Mohawk Power Corporation may choose to file, the company is directed to submit by March 22, 1985, draft tariff amendments that would show how it would implement the phase-in mechanism outlined in this ruling if the proposed policy is adopted.

3. Jurisdictional electric utilities are requested to provide estimates of the number and size of on-site generators that would qualify for the phase-in mechanism proposed by staff and an estimate of the dollar effect of this proposal on the company's costs of purchased energy.

4. This proceeding is continued.

By the Commission,

(SIGNED) JOHN J. KELLIHER
Secretary

APPENDIX G—New York State Public Service Commission Policy Statement Applicable to Qualifying Facilities That Provide Old Capacity (Issued: February 14, 1986)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission
held in the City of Albany
on February 5, 1986

COMMISSIONERS PRESENT:

Paul L. Gioia, Chairman
Carmel Carrington Marr
Anne F. Mead
Gail Garfield Schwartz

CASE 27824—Proceeding Regarding Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978.

POLICY STATEMENT APPLICABLE TO QUALIFYING FACILITIES THAT PROVIDE OLD CAPACITY
(Issued: February 14, 1986)

On January 22, 1985, we invited comments on a proposed policy statement concerning the purchase of electricity from qualifying cogeneration facilities, the construction of which commenced prior to November 9, 1978.

At that time we recognized that qualifying facilities providing old capacity may be entitled to full avoided costs if, after a case specific review, we were to determine that such rates are necessary for the viability of the facility or to increase output. In attempting to make such demonstrations, owners would be allowed to show that their costs of production have risen so as to render any previous rate insufficent to cover production costs, or to permit a reasonable return, or that their failure to

receive full avoided costs would not provide sufficient incentive to continue to produce electric power. Utilities opposing a petition for full avoided costs would be required to support their basis for believing that a lower rate would be consistent with the standards set forth in § 210 of PURPA and Section 66-c of the Public Service Law.

In addition, as an alternative to case-by-case determinations, we proposed that a qualifying facility providing old capacity be allowed, either at the end of any existing purchase contract or when permitted by an express provision in an existing agreement, to begin to receive a rate that would, at the end of a ten-year period, reach full avoided costs. Each year, the rate would increase by one-tenth the difference between the beginning rate (starting at a minimum of 50% of full avoided costs) and full avoided costs.

Ten comments were received. Niagara Mohawk, Allied Chemical and the three qualifying facilities, who filed comments previously (Bethlehem Steel Corp., Occidental Chemical Corp. and Boise Cascade Corp.), have submitted additional comments. In addition, three utility companies (Consolidated Edison Company [Con Ed], Rochester Gas & Electric Corporation [RG&E], New York State Electric & Gas Corporation [NYSE&G]) and two small cogenerators (Georgia-Pacific Corporation [Georgia-Pacific] and Hampshire Paper Company [Hampshire]) have filed comments for the first time.

Many of the positions set forth in this round of comments were raised previously. Such positions include the following contentions: that any decision to apply less than full avoided costs to old capacity would be contrary to federal and state law and policy (PURPA), PSL § 66-c and State Energy Plan) intended to encourage the development of cogeneration as an alternative energy source; that our decision in Opinion No. 81-10 decided that full avoided costs apply to old and new capacity; that any distinction made between old and new capacity is unfair to investors who pioneered this alternative energy source; and that a case-by-case method of determining eligibility for full avoided costs is administratively burdensome and subjects cogenerators to regulatory-type constraints not intended by PURPA or FERC's regulations implementing PURPA. With

respect to all such repetitions of previously made arguments we readopt our prior conclusions and decisions on these matters.

Discussion

As we previously have noted, in our ruling in this case inviting comments, FERC issued rules and regulations implementing Section 210 of PURPA (18 C.F.R. Part 292; 45 F.R. 12214, *et seq.*). Section 292.304(b) entitled "Relationship to avoided costs" differentiates between old and new capacity in connection with purchases and sales of electric power and requires only that utilities purchase, at their full avoided costs, the electrical output of a qualifying facility, construction of which was commenced after the date of enactment of PURPA (November 9, 1978). With regard to those facilities, construction of which was commenced prior to that date, FERC determined that the State regulatory authorities may establish rates for purchases at a rate lower than full avoided costs. FERC Order No. 69 specifically noted that the rule was intended to prevent a cogenerator or small power producer, which found it economical to produce power for its own consumption prior to the issuance of these rules, from receiving full avoided cost without new investment on its part. The FERC, therefore, concluded that appropriate economic returns were available without further incentives provided by Section 210 (45 F.R. *supra* at 12223). FERC Order No. 69 further states, however, that "if a previously existing facility shows that it requires rates for purchases based on full avoided costs to remain viable, or to increase its output, the State regulatory authority . . . is required to establish such rates." (*Id.*)

Thus, contrary to several commenters' assertion, the proposed case-by-case approach requiring "old capacity" facilities to demonstrate a need for full avoided costs, is entirely consistent with the FERC rules implementing PURPA and its underlying policy. Moreover, the contention that investors will be more inclined as a result of the policy statement to invest in new facilities rather than in existing facilities is speculative and does not necessarily flow from the adoption of a case-by-case or a phase-in mechanism.

In arguing that *ad hoc* determinations, as to the appropriate rate, would involve a utility-type investigation into the qualifying facility's costs and/or financial structure, from which such facilities are explicitly exempt, Boise Cascade refers to a statement by the Joint Conference Committee with regard to the enactment of Section 210 of PURPA. That statement reads as follows:

> It is not the intention of the conference that cogenerators and small power producers become subject, by virtue of this language, and the rules promulgated under this section, to the type of examination that is traditionally given to electric utility rate applications to determine what is the first and reasonable rate that they should receive for their electric power.
>
> (H.R. Conf. Rep. No. 1750, 95th Cong. 2d Sess. 63, 97, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7831).

FERC Order No. 69 notes that a major portion of the legislation is intended to exempt qualifying facilities from the cost-of-service regulation by which electric utilities traditionally have been regulated (45 F.R. 12222). However, these regulations further state that

> The Commission has decided to provide a broad exemption from State laws and regulations which would conflict with the State's implementation of the Commissions's rules under Section 210.
>
> The Commission believes that such broad exemption is necessary to encourage cogeneration or small power production. Accordingly, subparagraph (c)(1) *provides that any qualifying facility shall be exempt from State laws and regulations respecting rates of electric utilities, and from financial and organizational regulation of electric utilities.* Several commenters noted that this section might be interpreted as exempting qualifying facilities

> from state laws or regulations implementing the Commission's rules, under section 210(f) of PURPA. In order to clarify that qualifying facilities *are not to be exempt from these rules,* the Commission has added subparagraph (c)(2) *prohibiting any exemptions from State laws and regulations promulgated pursuant to Subpart C of these rules.* (45 F.R. 12233, emphasis added)

With regard to certain tax credits, the regulations further state that

> the Commission observes that the rates a qualifying facility will receive for sales of power to utilities are *not* based on a regulatory scheme which fixes a rate of return on investment of the qualifying facility . . . (*Id.* at 12228)

While is is clear that qualifying facilities are exempt from certain regulatory controls and utility-type scrutiny, these facilities are not exempt from State rules implementing Section 210 of PURPA. These rules include the authority granted to State regulatory bodies to set rates for old capacity at less than full avoided costs unless the qualifying facility demonstrates the need for full avoided costs in order to remain viable or increase its output (45 F.R. 12223). Thus, the general statement, that qualifying facilities are exempt from regulatory-type controls in order to encourage cogeneration, does not bar state commissions from employing a case-by-case approach in determining purchase rates for old capacity.

With regard to Allied, Bethlehem Steel, Occidental, and Boise's claim that we have already considered this matter, we previously noted that this issue is a matter of first impression. Prior to Niagara Mohawk's petition for a declaratory ruling, no party ever raised the issue and we have not stated our views concerning the FERC distinction between old and new capacity. Any reliance on Opinion No. 82-10 for investment purposes was unwarranted. We specifically noted in that opinion that, pursuant to 18 C.F.R. § 292.304 (b)(3), qualifying facilities whose construction began before November 9, 1978, need not be paid purchase rates equal to a utility's full avoided costs if a

state commission determines that a lower rate is "sufficient to encourage cogeneration and small power productions. (*sic*)" We further noted that no party had contended that such a finding was warranted in that case (Opinion No. 82-10, 107, n. 1).

NYSE&G requests a clarification of the policy statement with respect to the case-by-case approach because it claims that the statement, read broadly, could be misconstrued as permitting old capacity qualifying facilities, who entered into fixed-rate contracts that do not contain any option provision to change to tariff rates, to claim entitlement to full avoided costs upon demonstration of need. In response to this comment we note that it is clear from the statute and FERC's rules and regulations that PURPA does not interfere with any pre-existing binding contractual agreements between a qualifying facility and a utility, nor does it affect the validity of any contract, entered into after its promulgation, that contains purchase rates or terms or conditions different from those set forth in FERC's rules (18 C.F.R. § 292.301; 45 F.R. 12217).

Georgia-Pacific and Bethlehem Steel further argue that awarding qualifying facilities with old capacity less than full avoided costs contradicts FERC's rules and regulations because these rules require state commissions to make certain *findings* before they may provide for less than full avoided costs. In support of this argument these cogenerators cite to 18 C.F.R. § 292.304(b)(3) which states that purchase rates for old capacity may be less than full avoided cost if the state regulatory authority *determines* that the lower rate is (1) just and reasonable to the electric consumer of the utility and in the public interest; (2) is non-discriminatory against the qualifying cogenerator; and (3) is sufficient to encourage cogeneration and small power production.

Georgia-Pacific and Bethlehem Steel's argument is without merit. We have determined in the course of this ruling that rates below avoided costs are just and reasonable, non-discriminatory and sufficient to encourage cogeneration. As noted elsewhere in FERC's Order No. 69, the reason for differentiating between old and new capacity rests on the assumption that the commencement of construction of a facility prior to the enactment of PURPA "may indicate that appropriate eco-

nomic returns were available without the further incentives provided by section 210" (45 F.R. *supra* at 12223). However, recognizing that there may be some instances where the cost of production may have risen so as to render the previous rate insufficient to cover the costs of production, FERC's regulations specifically note that the state regulatory authority is required to establish full-avoided-cost rates "if a previously existing facility *shows* that it requires rates for purchases based on full avoided costs to remain viable, or to increase its output" (45 F.R. 12223). Thus, contrary to the commenters' claim, there is no presumption that old capacity is entitled to full-avoided costs. Rather, the burden rests upon the "old capacity" qualifying facility to demonstrate need, as it may, on a case-by-case basis.

Boise Cascade's proposal that a dollar criteria be adopted in the case-by-case approach does not appear to be a workable criteria for at least two reasons. First, a developer could invest substantial sums in buildings, landscaping or other items unrelated to improving the basic generator. Second, the operating costs of a facility, and hence, its need for full avoided costs, depends greatly on the type of facility in question. Ultimately, a case-by-case study would have to be conducted even with a dollar standard and, in some cases, such a standard may not be a fair or accurate measure of a cogenerator's need for full avoided costs. The better approach is to review the facts pertaining to each such facility on a case-by-case basis as contemplated by FERC's rules and regulations. For the same reason, we reject Niagara Mohawk's suggestion that qualifying facilities be required to demonstrate that costs are prudently incurred, representative of efficient operation and do not extend the operation of out-moded equipment. However, because in some instances, this information may be useful, whether to require it will be determined on a case-by-case basis.

Niagara Mohawk and Con Ed's proposal that a 90% cap be implemented with the ten-year phase-in procedure is unpersuasive inasmuch as it could undermine this phase-in procedure as an alternative to the case-by-case method as well as discourage economic investment in old capacity facilities.

With regard to the claim that the proposed ten-year phase-in period is too long, we continue to believe that ten years fairly represents the time in which old capacity should receive full avoided costs. However, due to the concerns expressed by Hampshire Paper—that the ten year phase-in, when coupled with remaining contractual obligations (in some case [*sic*], twenty years) is too long—we will modify the proposed ten-year phase-in procedure. Thus, a qualifying facility providing old capacity will be allowed, either at the end of any existing purchase contract, or when permitted by an express provision in an existing contract, to begin to review a rate structured as follows: Beginning in 1986, the rate would be 50% of full avoided costs.[1] Each year the rate would increase by five percentage points such that by the beginning of the sixth year the rate would be at 75% of full avoided costs and at the beginning of the 11th year, 1996, the rate would be at 100% of full avoided costs. Thus, for any facility that is contractually obliged to continue to sell power at some other rate for a period extending beyond 1996, the rate the facility would receive at the end of its contractual obligations would be full avoided costs.

Finally, as we requested, Niagara Mohawk has submitted a draft tariff amendment that shows how it would implement the phase-in mechanism. The company has proposed a Special Provision H. of Service Classification No. 6 which would state the following:

> H. A customer operating a qualifying facility, construction of which commenced prior to November 9, 1978, may negotiate a special contract with the company to begin to receive a rate that would, at the end of a ten year period, reach full avoided costs.

The language contained in this provision should be revised (1) to reflect the modification we are adopting and (2) to ensure

---

[1]Full avoided costs as defined in each utilities' service classification applicable to on-site generation facilities.

that it is not misread as requiring Niagara Mohawk to negotiate a special contract before the expiration of an existing contract, not containing an option provision.

Thus, we believe that Special Provision H. of Service Classification No. 6 should read as follows:

> H. A customer operating a qualifying facility, construction of which commenced prior to November 9, 1978, may negotiate a special contract with the company, at the termination of any existing contract or when permitted by an express provision in the contract, to begin to receive a rate that would in 1986 be set at 50% of full avoided costs and in each succeeding year would increase by five percentage points such that by 1996 all such facilities would receive 100% of full avoided costs.

Conclusion

Based on the foregoing, we adopt the policy first proposed in our order of January 22, 1985 with the exception that the ten-year phase-in procedure is modified as indicated above. Accordingly, it is directed that each electric utility shall file, within 30 days, a tariff provision to implement, in accordance with this policy statement, a ten-year phase-in procedure for qualifying facilities that provide old capacity.

By the Commission,

(SIGNED) JOHN J. KELLIHER
Secretary

APPENDIX H—Constitutional, Statutory and Regulatory Provisions Involved.

U.S. Const., art. VI, cl. 2.

Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

16 USC Section 796. Definitions

(17)(A) "small power production facility" means a facility which—

> (i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and
>
> (ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) "primary energy source" means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy—

> (i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and
>
> (ii) the minimum amounts of fuel required to alleviate or prevent—

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) "qualifying small power production facility" means a small power production facility—

(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(D) "qualifying small power producer" means the owner or operator of a qualifying small power production facility;

(18)(A) "cogeneration facility" means a facility which produces—

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) "qualifying congeneration facility" means a cogeneration facility which—

(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(C) "qualifying cogenerator" means the owner or operator of a qualifying cogeneration facility;

16 USC Section 824a-3. Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to—

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities[1] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representataives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogenera-

tion facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonabled to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric en-

ergy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which goethermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C.A. § 791a et seq.], from the Public Utililty Holding Company Act [15 U.S.C.A. § 79 et seq.], from State Laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using goethermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act [15 U.S.C.A. § 79 et seq.] and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—

(A) any State law or regulation in effect in a State pursuant to subsection (f) of this section,

(B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C.A. § 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act [16 U.S.C.A. § 791a et seq.], or

(C) any license or permit requirement under part I of the Federal Power Act [16 U.S.C.A. § 791a et seq.], any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date of one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated

electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) of this section with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 U.S.C.A. § 824 et seq.], such rule shall be treated as a rule under the Federal Power Act [16 U.S.C.A. § 791a et seq.]. Nothing in subsection (g) of this section shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) of this section shall be treated as a rule enforceable under the Federal Power Act [16 U.S.C.A. § 791a et seq.]. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of

the Federal Power Act. No enforcement action may be brought by the Commission under this section other than—

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) of this section[1] or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subsection with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(3) Federal contracts

No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

(4) Pass-throughs and diversions

Except for a hydroelectric project licensed at a Government dam (as defined in section 3(10) of the Federal Power Act [16 U.S.C.A. § 796(10)]) at which non-Federal hydroelectric development is permissible, this section shall not apply to any hy-

droelectic project which impounds or diverts the water of a natural watercourse by means of a new dam or diversion unless the project meets each of the following requirements:

(1) No substantial adverse effects

At the time of issuance of the license or exemption for the project, the Commission finds that the project will not have substantial adverse effects on the environment, including recreation and water quality. Such finding shall be made by the Commission after taking into consideration terms and conditions imposed under either paragraph (3) of this subsection or section 10 of the Federal Power Act [16 U.S.C.A. § 803] (whichever is appropriate as required by that Act [16 U.S.C.A. § 791a et seq.] or the Electric Consumers Protection Act of 1986) and compliance with other environmental requirements applicable to the project.

(2) Protected rivers

At the time the application for a license or exemption for the project is accepted by the Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to environmental consultation), such project is not located on either of the following:

(A) Any segment of a natural watercourse which is included in (or designated for potential inclusion in) a State or national wild and scenic river system.

(B) Any segment of a natural watercourse which the State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural, or scenic attributes which would be adversely affected by hydroelectric development.

(3) Fish and wildlife terms and conditions

The project meets the terms and conditions set by fish and wildlife agencies under the same procedures as provided for under section 30(c) of the Federal Power Act [16 U.S.C.A. § 823a(c)].

(k) Definition of new dam or diversion

For purposes of this section, the term "new dam or diversion" means a dam or diversion which requires, for purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or similar adjustable devices).

(l) Definitions

For purposes of this section, the terms "small power production facility", "qualifying small power production facility", "qualifying small power producer", "primary energy source", "cogeneration facility", "qualifying cogeneration facility", and "qualifying cogenerator" have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act [16 U.S.C.A. § 796(17), (18)].

16 USC Section 2601. Findings

The Congress finds that the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require—

(1) a program providing for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers,

(2) a program to improve the wholesale distribution of electric energy, the reliability of electric service, the procedures concerning consideration of wholesale rate applications before the Federal Energy Regulatory Commission, the participation of the public in matters before the Commission, and to provide other measures with respect to the regulation of the wholesale sale of electric energy,

(3) a program to provide for the expeditious development of hydroelectric potential at existing small dams to provide needed hydroelectric power,

(4) a program for the conservation of natural gas while insuring that rates to natural gas consumers are equitable,

(5) a program to encourage the development of crude oil transportation systems, and

(6) the establishment of certain other authorities as provided in title VI of this Act.

28 USC Section 2602. Definitions

As used in this Act, except as otherwise specifically provided—

(1) The term "antitrust laws" includes the Sherman Antitrust Act (15 U.S.C. 1 and following), the Clayton Act (15 U.S.C. 12 and following), the Federal Trade Commission Act (15 U.S.C. 14 [41] and following), the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21A).

(2) The term "class" means, with respect to electric consumers, any group of such consumers who have similar characteristics of electric energy use.

(3) The term "Commission" means the Federal Energy Regulatory Commission.

(4) The term "electric utility" means any person, State agency, or Federal agency, which sells electric energy.

(5) The term "electric consumer" means any person, State agency, or Federal agency, to which electric energy is sold other than for purposes of resale.

(6) The term "evidentiary hearing" means—

(A) in the case of a State agency, a proceeding which (i) is open to the public, (ii) includes notice to participants and an opportunity for such participants to present direct and rebuttal evidence and to cross-examine witnesses, (iii) includes a written decision, based upon evidence appearing in a written record of the proceeding, and (iv) is subject to judicial review;

(B) in the case of a Federal agency, a proceeding conducted as provided in sections 554, 556, and 557 of Title 5; and

(C) in the case of a proceeding conducted by any entity other than a State or Federal agency, a proceeding which conforms, to the extent appropriate, with the requirements of subparagraph (A).

(7) The Term "Federal agency" means an executive agency (as defined in section 105 of Title 5).

(8) The term "load management technique" means any technique (other than a time-of-day or seasonal rate) to reduce the maximum kilowatt demand on the electric utility, including ripple or radio control mecha-

nisms, and other types of interruptible electric service, energy storage devices, and load-limiting devices.

(9) The term "nonregulated electric utility" means any electric utility other than a State regulated electric utility.

(10) The term "rate" means (A) any price, rate, charge, or classification made, demanded, observed, or received with respect to sale of electric energy by an electric utility to an electric consumer, (B) any rule, regulation, or practice respecting any such rate, charge, or classification, and (C) any contract pertaining to the sale of electric energy to an electric consumer.

(11) The term "ratemaking authority" means authority to fix, modify, approve, or diapprove rates.

(12) The term "rate schedule" means the designation of the rates which an electric utility charges for electric energy.

(13) The term "sale" when used with respect to electric energy includes any exchange of electric energy.

(14) The term "Secretary" means the Secretary of Energy.

(15) The term "State" means the State, the District of Columbia, and Puerto Rico.

(16) The term "State agency" means a State, political subdivision thereof, and any agency or instrumentality of either.

(17) The term "State regulatory authority" means any State agency which has ratemaking authority with respect to the sale of electric energy by any electric utility (other than such State agency), and in the case of an

electric utility with respect to which the Tennessee Valley Authority has ratemaking authority, such term means the Tennessee Valley Authority.

(18) The term "State regulated electric utility" means any electric utility with respect to which a State regulatory authority has ratemaking authority.

16 USC Section 2603. Relationship to antitrust laws

Nothing in this Act or in any amendment made by this Act affects—

(1) the applicability of the antitrust laws to any electric utility or gas utility (as defined in section 3202 of Title 15), or

(2) any authority of the Secretary or of the Commission under any other provision of law (including the Federal Power Act [16 U.S.C.A. § 791a et seq.] and the Natural Gas Act [15 U.S.C.A. § 717 et seq.]) respecting unfair methods of competition or anticompetitive acts or practices.

16 USC Section 2611. Purposes

The purposes of this chapter are to encourage—

(1) conservation of energy supplied by electric utilities;

(2) the optimization of the efficiency of use of facilities and resources by electric utilities; and

(3) equitable rates to electric consumers.

16 USC Section 2612. Coverage

(a) Volume of total retail sales

This chapter applies to each electric utility in any calendar year, and to each proceeding relating to each electric utility in such year, if the total sales of electric energy by such utility for purposes other than resale exceeded 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

(b) Exclusion of wholesale sales

The requirements of this chapter do not apply to the operations of an electric utility, or to proceedings respecting such operations, to the extent that such operations or proceedings relate to sales of electric energy for purposes of resale.

List of covered utilities

Before the beginnig of each calendar year, the Secretary shall publish a list identifying each electric utility to which this chapter applies during such calendar year. Promptly after publication of such list each State regulatory authority shall notify the Secretary of each electric utility on the list for which such State regulatory authority has ratemaking authority.

16 USC Section 2613. Federal Contracts

Notwithstanding the limitation contained in section 2612(b) of this title, no contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into or renewed after November 9, 1978 may contain any provision which will have the effect of preventing the implementation of any requirement of subchapter II or III of this chapter. Any provision in any such contract which has such effect shall be null and void.

16 USC Section 2621. Consideration and determination respecting certain ratemaking standards

(a) Consideration and determination

Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall consider each standard established by subsection (d) of this section and make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this chapter. For purposes of such consideration and determination in accordance with subsections (b) and (c) of this section, and for purposes of any review of such consideration and determination in any court in accordance with section 2633 of this title, the purposes of this chapter supplement otherwise applicable State law. Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.

(b) Procedural requirements for consideration and determination

(1) The consideration referred to in subsection (a) of this section shall be made after public notice and hearing. The determination referred to in subsection (a) of this section shall be

(A) in writing

(B) based upon findings included in such determination and upon the evidence presented at the hearing, and

(C) available to the public

(2) Except as otherwise provided in paragraph (1) in the second sentence of section 2622(a) of this title, and in sections 2631 and 2632 of this title, the procedures for the consideration and determination referred to in subsection (a) of this section shall

be those established by the State regulatory authority or the nonregulated electric utility.

(c) Implementation

(1) The State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility may, to the extent consistent with otherwise applicable State law—

(A) implement any such standard determined under subsection (a) of this section to be appropriate to carry out the purposes of this chapter, or

(B) decline to implement any such standard.

(2) If a State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility declines to implement any standard established by subsection (d) of this section which is determined under subsection (a) of this section to be appropriate to carry out the purposes of this chapter, such authority or nonregulated electric utility shall state in writing the reasons therefor. Such statement of reasons shall be available to the public.

(d) Establishment

The following Federal standards are hereby established:

(1) Cost of service

Rates charged by any electric utility for providing electric service to each class of electric consumers shall be designed to the maximum extent practicable, to reflect the costs of providing electric service to such class, as determined under section 2625(a) of this title.

(2) Declining block rates

The energy component of a rate, or the amount attributable to the energy component in a rate, charged by any electric utility for providing electric service during any period to any class of electric consumers may not decrease as kilowatt-hour consumption by such class increases during such period except to the extent that such utility demonstrates that the costs to such utility of providing electric service to such class, which costs are attributable to such energy component, decrease as such consumption increases during such period.

(3) Time-of-day rates

The rates charged by any electric utility for providing electric service to each class of electric consumers shall be on a time-of-day basis which reflects the costs of providing electric service to such class of electric consumers at different times of the day unless such rates are not cost-effective with respect to such class, as determined under section 2625(b) of this title.

(4) Seasonal rates

The rates charged by an electric utility for providing electric service to each class of electric consumers shall be on a seasonal basis which reflects the costs of providing service to such class of consumers at different seasons of the year to the extent that such costs vary seasonally for such utility.

Interruptible rates

Each electric utility shall offer each industrial and commercial electric consumer an interruptible rate which reflects the cost of providing interruptible service to the class of which such consumer is a member.

(6) Load management techniques

Each electric utility shall offer to its electric consumers such load management techniques as the State regulatory authority (or the nonregulated electric utility) has determined will—

(A) be practicable and cost effective, as determined under section 2625(c) of this title,

(B) be reliable, and

(C) provide useful energy or capacity management advantages to the electric utility.

16 USC Section 2622. Obligations to consider and determine

(a) Request for consideration and determination

Each state regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility may undertake the consideration and make the determination referred to in section 2621 of this title with respect to any standard established by section 2621(d) of this title in any proceeding respecting the rates of the electric utility. Any participant or intervenor (including an intervenor referred to in section 2631 of this title) in such a proceeding may request, and shall obtain, such consideration and determination in such proceeding. In undertaking such consideration and making such determination in any such proceeding with respect to the application to any electric utility of any standard established by section 2621(d) of this title, a State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or nonregulated electric utility may take into account in such proceeding—

(1) any appropriate prior determination with respect to such standard

(A) which is made in a proceeding which takes place after November 9, 1978, or

(B) which was made before such date (or is made in a proceeding pending on such date) and complies, as provided in section 2634, of this title, with the requirements of this chapter; and

(2) the evidence upon which such prior determination was based (if such evidence is referenced in such proceeding).

(b) Time limitations

(1) Not later than 2 years after November 9, 1978, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall commence the consideration referred to in section 2621 of this title, or set a hearing date for such consideration with respect to each standard established by section 2621(d) of this title.

(2) Not later than three years after November 9, 1978, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority), and each nonregulated electric utility, shall complete the consideration, and shall make the determination, referred to in section 2621 of this title with respect to each standard established by section 2621(d) of this title.

(c) Failure to comply

Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall undertake the consideration, and make the determination, referred to in section 2621 of this title with respect to each standard established by section 2621(d) of this title in the first rate proceeding commenced after the date three years after November 9, 1978 respecting the rates of such utility if such State regulatory authority or nonregulated electric utility has not, before such date, complied with subsection (b)(2) of this section with respect to such standard.

16 USC Section 2623. Adoption of certain standards

(a) Adoption of standards

Not later than two years after November 9, 1978, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority), and each nonregulated electric utility, shall provide public notice and conduct a hearing respecting the standards established by subsection (b) of this section and, on the basis of such hearing, shall—

(1) adopt the standards established by subsection (b) of this section (other than paragraph (4) thereof) if, and to the extent, such authority or nonregulated electric utility determines that such adoption is appropriate to carry out the purposes of this chapter, is otherwise appropriate, and is consistent with otherwise applicable State law, and

(2) adopt the standard established by subsection(b)(4) of this section if, and to the extent, such authority or nonregulated electric utility determines that such adoption is appropriate and consistent with otherwise applicable State law.

For purposes of any determination under paragraphs (1) or (2) and any review of such determination in any court in accordance with section 2633 of this title, the purposes of this chapter supplement otherwise applicable State law. Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to adopt any such standard, pursuant to its authority under otherwise applicable State law.

(b) Establishment

The following Federal standards are hereby established:

(1) Master metering

To the extent determined appropriate under section 2625(d) of this title, master metering of electric service in the case of new buildings shall be prohibited or restricted to the extent necessary to carry out the purposes of this chapter.

(2) Automatic adjustment clauses

No electric utility may increase any rate pursuant to an automatic adjustment clause unless such clause meets the requirements of section 2625(e) of this title.

(3) Information to consumers

Each electric utility shall transmit to each of its electric consumers information regarding rate schedules in accordance with the requirements of section 2625(f) of this title.

(4) Procedures for termination of electric service

No electric utility may terminate electric service to any electric consumer except pursuant to procedures described in section 2625(g) of this title.

(5) Advertising

No electric utility may recover from any person other than the shareholders (or other owners) of such utility any direct or indirect expenditure by such utility for promotional or political advertising as defined in section 2625(h) of this title.

(c) Procedural requirements

Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility, within the two-year period specified in subsection (a) of this section, shall (1) adopt, pursuant to subsection (a) of this section, each of the standards

established by subsection (b) of this section or, (2) with respect to any such standard which is not adopted, such authority or nonregulated electric utility shall state in writing that it has determined not to adopt such standard, together with the reasons for such determination. Such statement of reasons shall be available to the public.

16 USC Section 2624. Lifeline rates

(a) Lower rates

No provision of this chapter prohibits a State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or a nonregulated electric utility from fixing, approving, or allowing to go into effect a rate for essential needs (as defined by the State regulatory authority or by the nonregulated electric utility, as the case may be) or residential electric consumers which is lower than a rate under the standard referred to in section 2621(d)(1) of this title.

(b) Determination

If any State regulated electric utility or nonregulated electric utility does not have a lower rate as described in subsection (a) of this section in effect two years after November 9, 1978, the State regulatory authority having ratemaking authority with respect to such State regulated electric utility or the nonregulated electric utility, as the case may be, shall determine, after an evidentiary hearing, whether such a rate should be implemented by such utility.

(c) Prior proceedings

Section 2634 of this title shall not apply to the requirements of this section.

16 USC Section 2625. Special rules for standards

(a) Cost of service

In undertaking the consideration and making the determination under section 2621 of this title with respect to the standard concerning cost of service established by section 2621(d)(1) of this title, the costs of providing electric service to each class of electric consumers shall, to the maximum extent practicable, be determined on the basis of methods prescribed by the State regulatory authority (in the case of a State regulated electric utility) or by the electric utility (in the case of a nonregulated electric utility). Such methods shall to the maximum extent practicable—

(1) permit identification of differences in cost-incurrence, for each such class of electric consumers, attributable to daily and seasonal time of use of service and

(2) permit identification of differences in cost-incurrence attributable to differences in customer demand, and energy components of cost. In prescribing such methods, such State regulatory authority or nonregulated electric utility shall take into account the extent to which total costs to an electric utility are likely to change if

(A) additional capacity is added to meet peak demand relative to base demand; and

(B) additional kilowatt-hours of electric energy are delivered to electric consumers.

(b) Time-of-day rates

In undertaking the consideration and making the determination required under section 2621 of this title with respect to the standard for time-of-day rates established by section 2621(d)(3) of this title, a time-of-day rate charged by an electric utility for

providing electric service to each class of electric consumers shall be determined to be cost-effective with respect to each such class if the long-run benefits of such rate to the electric utility and its electric consumers in the class concerned are likely to exceed the metering costs and other costs associated with the use of such rates.

(c) Load management techniques

In undertaking the consideration and making the determination required under section 2621 of this title with respect to the standard for load management techniques established by section 2621(d)(6) of this title, a load management techique shall be determined, by the State regulatory authority or nonregulated electric utility, to be cost-effective if—

(1) Such technique is likely to reduce maximum kilowatt demand on the electric utility, and

(2) the long-run cost savings to the utility of such reduction are likely to exceed the long run cost to the utility associated with implementation of such technique.

(d) Master metering

Separate metering shall be determined appropriate for any new building for purposes of section 2623(b)(1) of this title if

(1) there is more than one unit in such building,

(2) the occupant of each such unit has control over a portion of the electric energy used in such unit, and

(3) with respect to such portion of electric energy used in such unit, the long run benefits to the electric consumers in such building exceed the costs of purchasing and installing separate meters in such building.

(e) Automatic adjustment clauses

(1) An automatic adjustment clause of an electric utility meets the requirements of this subsection if—

> (A) such clause is determined, not less often than every four years, by the State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or by the electric utility (in the case of a nonregulated electric utility), after an evidentiary hearing, to provide incentives for efficient use of resources (including incentives for economical purchase and use of fuel and electric energy) by such electric utility, and
>
> (B) such clause is reviewed not less than often than every two years, in the manner described in paragraph (2), by the State regulatory authority having ratemaking authority with respect to such utility (or by the electric utility in the case of a nonregulated electric utility), to insure the maximum economics in those operations and purchases which affect the rates to which such clause applies.

(2) In making a review under subparagraph (B) of paragraph (1) with respect to an electric utility, the reviewing authority shall examine and, if appropriate, cause to be audited the practices of such electric utility relating to costs subject to an automatic adjustment clause, and shall require such reports as may be necessary to carry out such review (including a disclosure of any ownership or corporate relationship between such electric utility and the seller to such utility of fuel, electric energy, or other item).

(3) As used in this subsection and section 2623(b) of this title, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such

item does not include an interim rate which takes affect subject to a later determination of the appropriate amount of the rate.

(f) Information to consumers

(1) For purposes of the standard for information to consumers established by section 2623(b)(3) of this title, each electric utility shall transmit to each of its electric consumers a clear and concise explanation of the existing rate schedule and any rate schedule applied for (or proposed by a nonregulated electric utility) applicable to such consumer. Such statement shall be transmitted to each such consumer—

> (A) not later than sixty days after the date of commencement of service to such consumer or ninety days after the standard established by section 2623(b)(3) of this title is adopted with respect to such electric utility, whichever last occurs, and
>
> (B) not later than thirty days (sixty days in the case of an electric utility which uses a bimonthly billing system) after such utility's application for any change in a rate schedule applicable to such consumer (or proposal of such a change in the case of a nonregulated utility).

(2) For purposes of the standard information to consumers established by section 2623(b)(3) of this title, each electric utility shall transmit to each of its electric consumers not less frequently than once each year—

> (A) a clear and concise summary of the existing rate schedules applicable to each of the major classes of its electric consumers for which there is a separate rate, and
>
> (B) an identification of any classes whose rates are not summarized.

Such summary may be transmitted together with such consumer's billing or in such other manner as the State regulatory authority or nonregulated electric utility deems appropriate.

(3) For purposes of the standard for information to consumers established by section 2623(b)(3) of this title, each electric utility, on request of an electric consumer of such utility, shall transmit to such consumer a clear and concise statement of the actual consumption (or degree-day adjusted consumption) of electric energy by such consumer for each billing period during the prior year (unless such consumption data is not reasonably ascertainable by the utility).

(g) Procedures for termination of electric service

The procedures for termination of service referred to in section 2623(b)(4) of this title are procedures prescribed by the State regulatory authority (with respect to electric utilities for which it has ratemaking authority) or by the nonregulated electric utility which provide that—

(1) no electric service to an electric consumer may be terminated unless reasonable prior notice (including notice of rights and remedies) is given to such consumer and such consumer has a reasonable opportunity to dispute the reasons for such termination, and

(2) during any period when termination of service to an electric consumer would be especially dangerous to health, as determined by the State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or nonregulated electric utility, and such consumer establishes that—

(A) he is unable to pay for such service in accordance with the requirements of the utility's billing, or

(B) he is able to pay for such service but only in installments, such service may be terminated.

Such procedures shall take into account the need to include reasonable provisions for elderly and handicapped consumers.

(h) Advertising

(1) For purposes of this section and section 2623(b)(5) of this title—

(A) The term "advertising" means the commercial use, by the electric utility, of any media, including newspaper, printed matter, radio, and television, in order to transmit a message to a substantial number of members of the public or to such utility's electric consumers.

(B) The term "political advertising" means any advertising for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters, or with respect to any controversial issue of public importance.

(C) The term "promotional advertising" means any advertising for the purpose for encouraging any person to select or use the service or additional service of an electric utility or the selection or installation of any appliance or equipment designed to use such utility's service.

(2) For purposes of this subsection and section 2623(b)(5) of this title, the terms "political advertising" and "promotional advertising" do not include—

(A) advertising which inform electric consumers how they can conserve energy or can reduce peak demand for electric energy.

(B) advertising required by law or regulation, including advertising required under part 1 of title II of the National Energy Conservation Policy Act [42 U.S.C.A. § 8211 et seq.],

(C) advertising regarding service interruptions, safety measures, or emergency conditions.

(D) advertising concerning employment opportunities with such utility.

(E) advertising which promotes the use of energy efficient appliances, equipment or services, or

(F) any explanation or justification of existing or proposed rate schedules, or notification of hearings thereon.

16 USC Section 2626. Reports respecting standards

(a) State authorities and nonregulated utilities

Not later than one year after November 9, 1978 and annually thereafter for ten years, each State regulatory authority (with respect to each State regulated electric utility for which it has ratemaking authority), and each nonregulated electric utility, shall report to the Secretary, in such manner as the Secretary shall prescribe, respecting its consideration of the standards established by section 2621(d) and 2623(b) of this title. Such report shall include a summary of the determinations made and actions taken with respect to each such standard on a utility-by-utility basis.

(b) Secretary

Not later than eighteen months after November 9, 1978 and annually thereafter for ten years, the Secretary shall submit a report to the President and the Congress containing—

(1) a summary of the reports submitted under subsection (a) of this section,

(2) his analysis of such reports, and

(3) his actions under this chapter, and his recommendations for such further Federal actions, including any legislation, regarding retail electric utility rates (and other practices) as may be necessary to carry out the purposes of this chapter.

16 USC Section 2627. Relationship to State law

(a) Revenue and rate of return

Nothing in this chapter shall authorize or require the recovery by an electric utility of revenues, or of a rate of return, in excess of, or less than, the amount of revenues or the rate of return determined to be lawful under any other provision of law.

(b) State authority

Nothing in this chapter prohibits any State regulatory authority or nonregulated electric utility from adopting, pursuant to State Law, any standard or rule affecting electric utilities which is different from any standard established by this subchapter.

(c) Federal agencies

With respect to any electric utility which is a Federal agency, and with respect to the Tennessee Valley Authority when it is treated as a State regulatory authority as provided in section 2602(17) of this title, any reference in section 2621 or 2623 of this title to State law shall be treated as a reference to Federal law.

16 USC Section 2631. Intervention in proceedings

(a) Authority to intervene and participate

In order to initiate and participate in the consideration of one or more of the standards established by subchapter II of this chapter or other concepts which contribute to the achievement of the purposes of this chapter, the Secretary, any affected electric utility, or any electric consumer of an affected electric utility may intervene and participate as a matter of right in any ratemaking proceeding or other appropriate regulatory proceeding relating to rates or rate design which is conducted by a State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or by a nonregulated electric utility.

(b) Access to information

Any intervenor or participant in a proceeding described in subsection (a) of this section shall have access to information available to other parties to the proceeding if such information is relevant to the issues to which his intervention or participation in such proceeding relates. Such information may be obtained through reasonable rules relating to discovery of information prescribed by the State regulatory authority (in the case of proceedings concerning electric utilities for which it has ratemaking authority) or by the nonregulated electric utility (in the case of a proceeding conducted by a nonregulated electric utility).

(c) Effective date; procedures

Any intervention or participation under this section, in any proceeding commenced before November 9, 1978 but not completed before such date, shall be permitted under this section only to the extent such intervention or participation is timely under otherwise applicable law.

16 USC Section 2632. Consumer representation

(a) Compensation for costs of participation or intervention

(1) If no alternative means for assuring representation of electric consumers is adopted in accordance with subsection (b) of this section and if an electric consumer of an electric utility substantially contributed to the approval, in whole or in part, of a position advocated by such consumer in a proceeding concerning such utility, and relating to any standard set forth in subchapter II of this chapter, such utility shall be liable to compensate such consumer (pursuant to paragraph (2)) for reasonable attorneys' fees, expert witness fees, and other reasonable costs incurred in preparation and advocacy of such position in such proceeding (including fees and costs of obtaining judicial review of any determination made in such proceeding with respect to such position).

(2) A consumer entitled to fees and costs under paragraph (1) may collect such fees and costs from an electric utility by bringing a civil action in any State court of competent jurisdiction, unless the State regulatory authority (in the case of a proceeding concerning a State regulated electric utility) or nonregulated electric utility (in the case of a proceeding concerning such nonregulated electric utility) has adopted a reasonable procedure pursuant to which such authority or nonregulated electric utility—

(A) determines the amount of such fees and costs, and

(B) includes an award of such fees and costs in its order in the proceeding.

(3) The procedure adopted by such State regulatory authority or nonregulated utility under paragraph (2) may include a preliminary proceeding to require that—

(A) as a condition of receiving compensation under such procedure such consumer demonstrate that, but for the ability to receive such award, participation or intervention in such proceeding may be a significant financial hardship for such consumer, and

(B) persons with the same or similar interests have a common legal representative in the proceeding as a condition to receiving compensation.

(b) Alternative means

Compensation shall not be required under subsection (a) of this section if the State, the State regulatory authority (in the case of a proceeding concerning a State regulated electric utility), or the nonregulated electric utility (in the case of a proceeding concerning such nonregulated electric utility) has provided an alternative means for providing adequate compensation to persons—

(1) who have, or represent, an interest—

(A) which would not otherwise be adequately represented in the proceeding, and

(B) representation of which is necessary for a fair determination in the proceeding, and

(2) who are, or represent an interest which is, unable to effectively participate or intervene in the proceeding because such persons cannot afford to pay reasonable attorneys' fees, expert witness fees, and other reasonable costs of preparing for, and participating or intervening in, such proceeding (including fees and costs of obtaining judicial review of such proceeding).

(c) Transcripts

The State regulatory authority or nonregulated electric utility, as the case may be, shall make transcripts of the proceeding available, at cost of reproduction, to parties or intervenors in any ratemaking proceeding, or other regulatory proceeding relating to rates or rate design, before a State regulatory authority or nonregulated electric utility.

(d) Federal agencies

Any claim under this section against any Federal agency shall be subject to the availability of appropriated funds.

(e) Rights under other authority

Nothing in this section affects or restricts any rights of any participant or intervenor in any proceeding under any other applicable law or rule of law.

16 USC Section 2633. Judicial review and enforcement

(a) Limitation of Federal jurisdiction

Not withstanding any other provision of law, no court of the United States shall have jurisdiction over any action arising under any provision of subchapter I or II of this chapter or of this subchapter except for—

> (1) an action over which a court of the United States has jurisdiction under subsection (b) or (c)(2) of this section; and
>
> (2) review of any action in the Supreme Court of the United States in accordance with sections 1257 and 1258 of Title 28.

(b) Enforcement of intervention right

(1) The Secretary may bring an action in any appropriate court of the United States to enforce his right to intervene and participate under section 2631(a) of this title, and such court shall have jurisdiction to grant appropriate relief.

(2) If any electric utility or electric consumer having a right to intervene under section 2631(a) of this title is denied such right by any State court, such electric utility or electric consumer may bring an action in the appropriate United States district court to require the State regulatory authority or nonregulated electric utility to permit such intervention and participation, and such court shall have jurisdiction to grant appropriate relief.

(3) Nothing in this subsection prohibits any person bringing any action under this subsection in a court of the United States from seeking review and enforcement at any time in any State court of any rights he may have with respect to any motion to intervene or participate in any proceeding.

(c) Review and enforcement

(1) Any person (including the Secretary) may obtain review of any determination made under suchapter I or II of this chapter or under this subchapter with respect to any electric utility (other than a utility which is a Federal agency) in the appropriate State court if such person (or the Secretary) intervened or otherwise participated in the original proceeding or if State law otherwise permits such review. Any person (including the Secretary) may bring an action to enforce the requirements of this chapter in the appropriate State court, except that no such action may be brought in a State court with respect to a utility which is a Federal agency. Such review or action in a State court shall be pursuant to any applicable State procedures.

(2) Any person (including the Secretary) may obtain review in the appropriate court of the United States of any determination made under subchapter I or II of this chapter or this subchapter by a Federal agency if such person (or the Secretary) intervened or otherwise participated in the original proceeding or if otherwise applicable law permits such review. Such court shall have jurisdiction to grant appropriate relief. Any person (including the Secretary) may bring an action to enforce the requirements of subchapter I or II of this chapter or this subchapter with respect to any Federal agency in the appropriate court of the United States and such court shall have jurisdiction to grant appropriate relief.

(3) In addition to his authority to obtain review under paragraph (1) or (2), the Secretary may also participate as an *amicus curiae* in any review by any court of an action arising under the provisions of subchapter I or II of this chapter or this subchapter.

(d) Other authority of Secretary

Nothing in this section prohibits the Secretary from—

(1) intervening and participating in any proceeding, or

(2) intervening and participating in any review by any court of any action under section 6804 of Title 42.

16 USC Section 2634. Prior and pending proceedings

For purposes of subchapters I and II of this chapter, and this subchapter, proceedings commenced by State regulatory authorities (with respect to electric utilities for which it has ratemaking authority) and nonregulated electric utilities before November 9, 1978 and actions taken before such date in such proceedings shall be treated as complying with the requirements of subchapters I and II of this chapter, and this subchapter if such proceedings and actions substantially conform to such requirements. For purposes of subchapters I and II of

this chapter, and this subchapter, any such proceeding or action commenced before November 9, 1978, but not completed before such date, shall comply with the requirements of subchapters I and II of this chapter, and this subchapter, to the maximum extent practicable with respect to so much of such proceeding or action as takes place after such date, except as otherwise provided in section 2631(c) of this title.

16 USC Section 2641. Voluntary guidelines

The Secretary may prescribe voluntary guidelines respecting the standards established by sections 2621(d) and 2623(b) of this title. Such guidelines may not expand the scope or legal effect of such standards or establish additional standards respecting electric utility rates.

16 USC Section 2642. Responsibilities of Secretary

(a) Authority

The Secretary may periodically notify the State regulatory authorities and electric utilities identified pursuant to section 2612(c) of this title of—

(1) load management technique and the results of studies and experiments concerning load management techniques;

(2) developments and innovations in electric utility ratemaking throughout the United States, including the results of studies and experiments in rate structure and rate reform;

(3) methods for determining cost of service; and

(4) any other data or information which the Secretary determines would assist such authorities and utilities in carrying out the provisions of this chapter.

(b) Technical assistance

The Secretary may provide such technical assistance as he determines appropriate to assist the State regulatory authorities in carrying out their responsibilties under subchapter II of this chapter and as is requested by any State regulatory authority relating to the standards established by subchapter II of this chapter.

(c) Appropriations

There are authorized to be appropriated to carry out the purposes of subsection (b) of this section not to exceed $1,000,000 for each of the fiscal years 1979 and 1980.

16 USC Section 2643. Gathering information on costs of service

(a) Information required to be gathered

Each electric utility shall periodically gather information under such rules (promulgated by the Commission) as the Commission determines necessary to allow determination of the costs associated with providing electric service. For purposes of this section, and for purposes of any consideration and determination respecting the standard established by section 2621(d)(2) of this title, such costs shall be separated, to the maximum extent practicable, into the following components: customer cost component, demand cost component, and energy cost component. Rules under this subsection shall include requirements for the gathering of the following information with respect to each electric utility—

(1) the costs of serving each electric consumer class, including costs of serving different consumption patterns within such class, based on boltage level, time of use, and other appropriate factors;

(2) daily kilowatt demand load curves for all electric consumer classes combined representative of daily and

seasonal differences in demand, and daily kilowatt demand load curves for each electric consumer class for which there is a separate rate, representative of daily and seasonal differences in demand;

(3) annual capital, operating, and maintenance costs—

(A) for transmission and distribution services, and

(B) for each type of generating unit; and

(4) costs of purchased power, including representative daily and seasonal differences in the amount of such costs.

Such rules shall provide that information required to be gathered under this section shall be presented in such categories and such detail as may be necessary to carry out the purposes of this section.

(b) Commission rules

The Commission shall, within 180 days after November 9, 1978, by rule, prescribe the methods, procedure, and format to be used by electric utilities in gathering the information described in this section. Such rules may provide for the exemption by the Commission of an electric utility or class of electric utilities from gathering all or part of such information, in cases where such utility or utilities show and the Commission finds, after public notice and opportunity for the presentation of written data, views, and arguments, that gathering such information is not likely to carry out the purposes of this section. The Commission shall periodically review such findings and may revise such rules.

(c) Filing and publication

Not later than two years after November 9, 1978, and periodically, but not less frequently than every two years thereafter, each electric utility shall file with—

(1) the Commission, and

(2) any State regulatory authority which has ratemaking authority for such utility,

the information gathered pursuant to this section and make such information available to the public in such form and manner as the Commission shall prescribe. In addition, at the time of application for, or proposal of, any rate increase, each electric utility shall make such information available to the public in such form and manner as the Commission shall prescribe. The two-year period after November 9, 1978 specified in this subsection may be extended by the Commission for a reasonable additional period in the case of any electric utility for good cause shown.

(d) Enforcement

For purposes of enforcement, any violation of a requirement of this section shall be treated as a violation of a provision of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 791 et seq.] enforceable under section 12 of such Act [15 U.S.C.A. § 797] (notwithstanding any expiration date in such Act) except that in applying the provisions of such section 12 any reference to the Federal Energy Administrator shall be treated as a reference to the Commission.

16 USC Section 2644. Relationship to other authority

Nothing in this chapter shall be construed to limit or affect any authority of the Secretary or the Commission under any other provision of law.

16 USC Section 2645. Utility regulatory institute

(a) Matching grants

The Secretary may make grants under this section to an institute established by the National Association of Regulatory Utility Commissioners to enable such institute to—

(1) conduct research on electric and gas utility regulatory policy issues.

(2) develop data processing and retrieval methods for electric and gas utility ratemaking, and

(3) perform other functions directly related to assisting State regulatory authorities in carrying out their functions under State law and this Act.

(b) Federal share

Grants under this section shall not be used to provide more than the following percentages of the cost to the institute of carrying out the activities specified in subsection (a) of this section:

(1) 80 percent for the fiscal year 1979; and

(2) 60 percent for the fiscal year 1980.

The remaining amounts expended by the institute may not be provided from Federal sources.

(c) Restrictions

Grants under this section may not be made subject to terms and conditions other than those the Secretary deems necessary for purposes of administering this section and for purposes of assuring that—

(1) all information gathered by the institute is available to the Secretary, the Commission, and the public, and

(2) no portion of any such grant is used to support or oppose any legislative proposal except by means of testimony by representatives of the institute provided by invitation to a committee of Congress or of a State legislature.

(d) Authorization of appropriations

There is authorized to be appropriated not more than $2,000,000 for each of the fiscal years 1979 and 1980 for purposes of making grants under this section. No amounts may be appropriated for any fiscal year after the fiscal year 1980 to carry out the purposes of this section without a specific authorization of Congress.

New York Public Service Law Section 66-c. Conservation of energy

1. It is hereby declared to be the policy of this state that it is in the public interest to encourage the development of alternate energy production facilities, co-generation facilities and small hydro facilities in order to conserve our finite and expensive energy resources and to provide for their most efficient utilization. In furtherance of this declared policy, the commission shall encourage the participation of utilities in co-generation, small hydro and alternate energy production facilities either directly or through subsidiaries formed pursuant to the provisions of subdivision two of this section. In addition, the commission shall require any electric corporation or steam corporation (a) to enter into long-term contracts to purchase or wheel electricity or useful thermal energy from any alternate energy production, small hydro or co-generation facility under such terms and conditions as the commission shall find just and economically reasonable to the corporation's ratepayers, non-discriminatory to co-generator, small hydro producers and alternate energy producers and further the public policy set forth herein; provided, however, the commission shall establish a minimum sales price for such purchased electricity from any

such facility developed on or after June twenty-six, nineteen hundred eighty, of at least six cents per kilowatt hour for each utility, which sales price shall be subject to periodic revision by the commission to reflect increases in the cost of utility generated electricity, and (b) to provide supplemental or backup power to any alternate energy production, small hydro or co-generation facility on a non-discriminatory basis and at just and reasonable rates; provided however, that nothing contained in this section shall require any such electric or steam corporation to construct any additional facilities for such purposes unless such facilities are paid for in full by the owner or operator of the co-generation, small hydro or alternate energy production facility.

2. Notwithstanding any other provision of law, any gas, electric or steam corporation shall, upon forty-five days notice to the commission, be authorized to establish, and finance out of retained earnings (unless the commission shall find that such financing may affect the corporations ability to meet its obligation to provide safe and adequate service at just and reasonable charges to its own customers) a subsidiary corporation, which corporation shall have as its sole purpose the ownership and/or operation, in whole or in part, of one or more co-generation, small hydro or alternate energy production facilities. Any such subsidiary corporation shall be exempt from any regulation by the commission under this chapter and the commission shall have no authority to regulate any rates, charges, service terms or service practices relating to any electricity, gas or steam produced by any such subsidiary corporation at any such facility except as specifically provided in subdivision one of this section.

8. (a) Any subsidiary corporation established by an electric, gas or steam corporation pursuant to the authorization of subdivision two of this section shall comply with the following criteria:

(1) If any such subsidiary shall obtain use of transmission facilities or any services necessary for the sale or purchase of the

energy generated from its co-generation, small hydro or alternate energy production facilities from any affiliated gas, electric or steam corporation, it shall do so only pursuant to a tariff filed with the commission by such gas, electric or steam corporation;

(2) Any such subsidiary corporation shall operate independently from any affiliated gas, electric or steam corporation in the establishment and operation of co-generation, small hydro or alternate energy production facilities and in the sale of energy produced from such facilities. It shall maintain its own books of account, have separate officers, utilize separate operating, marketing, installation, and maintenance personnel, and utilize separate computer facilities;

(3) Any such subsidiary corporation shall deal with any affiliated gas, electric or steam corporation only on an arm's length basis;

(4) All transactions between such a subsidiary corporation and an affiliated gas, electric or steam corporation which involve the transfer, either directly or by accounting or other record entries, of money, personnel, resources, other assets or anything of value, shall be reduced to writing. A copy of any contract, agreement, or other arrangement entered into between such entities shall be filed by the affiliated gas, electric or steam corporation with the commission within thirty days after the contract, agreement, or other arrangement is made. This provision shall not apply to any transaction governed by the provision of any existing state or federal law, regulation or tariff.

(b) Any gas, electric or steam corporation affiliated with such a subsidiary corporation shall:

(1) not engage in promoting the sale of energy from the subsidiary's co-generation, small hydro or alternate energy production facilities; and

(2) not provide to any such subsidiary corporation any customer proprietary information, unless such information is made available to any member of the public upon request on the same terms and conditions under which such information is made available to the subsidiary.

(c) The rate of return for any gas, electric or steam corporation affiliated with any such subsidiary corporation shall not be based in whole or in part on the capitalization of such subsidiary nor shall the revenue requirements for any such gas, electric or steam corporation be based on any transactions between the gas, electric or steam corporation and its subsidiary which are not in compliance with paragraph a of subdivision three of this section.

18 CFR Section 292.101(b)(1), (6). Definitions

(1) "Qualifying facility" means a co-generation facility or a small power production facility which is a qualifying facility under Subpart B of this part of the Commission's regulations . . .

(6) "Avoided cost" means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.

18 CFR Section 292, Subpart B. Qualifying Cogeneration and Small Power Production Facilities

§ 292.201 Scope.

This subpart applies to the criteria for and manner of becoming a qualifying small power production facility and a qualifying cogeneration facility under sections 3(17)(C) and 3(18)(B), respectively, of the Federal Power Act, as amended by section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA).

§ 292.202 Definitions.

For purposes of this subpart:

(a) "Biomass" means any organic material not derived from fossil fuels;

(b) "Waste" means by-product materials other than biomass;

(c) "Cogeneration facility" means equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy;

(d) "Topping-cycle cogeneration facility" means a cogeneration facility in which the energy input to the facility is first used to produce useful power output, and the reject heat from power production is then used to provide useful thermal energy;

(e) "Bottoming-cycle cogeneration facility" means a cogeneration facility in which the energy input to the system is first applied to a useful thermal energy process, and the reject heat emerging from the process is then used for power production;

(f) "Supplementary firing" means an energy input to the cogeneration facility used only in the thermal process of a topping-cycle cogeneration facility, or only in the electric generating process of a bottoming-cycle cogeneration facility;

(g) "Useful power output" of a cogeneration facility means the electric or mechanical energy made available for use, exclusive of any such energy used in the power production process;

(h) "Useful thermal energy output" of a topping-cycle cogeneration facility means the thermal energy made available for use in any industrial or commercial process or used in any heating or cooling application;

(i) "Total energy output" of a topping-cycle cogeneration facility is the sum of the useful power output and useful thermal energy output;

(j) "Total energy input" means the total energy of all forms supplied from external sources;

(k) "Natural gas" means either natural gas unmixed, or any mixture of natural gas and artificial gas;

(l) "Oil" means crude oil, residual fuel oil, natural gas liquids, or any refined petroleum products; and

(m) Energy input in the case of energy in the form of natural gas or oil is to be measured by the lower heating value of the natural gas or oil;

(n) "Electric utility holding company" means a holding company, as defined in section 2(a)(7) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(7) which owns one or more electric utilities, as defined in section 2(a)(3) of that Act, 15 U.S.C. 79b(a)(3), but does not include any holding company which is exempt by rule or order adopted or issued pursuant to sections 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1936, 15 U.S.C. 79c(a)(3) or 79c(a)(5).

(o) "Utility geothermal small power production facility" means a small power production facility which uses geothermal energy as the primary energy resource and of which more than 50 percent is owned either:

(1) By an electric utility or utilities, electric utility holding company or companies, or any combination thereof.

(2) By any company 50 percent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote by an electric utility, electric utility holding company, or any combination thereof.

§ 292.203 General requirements for qualification.

(a) *Small power production facilities.* Except as provided in paragraph (c) of this section, a small power production facility is a qualifying facility if it:

(1) Meets the maximum size criteria specified in § 292.204(a);

(2) Meets the fuel use criteria specified in § 292.204(b); and

(3) Meets the ownership criteria specified in § 292.206.

(b) *Cogeneration facilities.* A cogeneration facility, including any diesel and dual-fuel cogeneration facility, is a qualifying facility if it:

(1) Meets any applicable operating and efficiency standards specified in § 292.205(a) and (b); and

(2) Meets the ownership criteria specified in § 292.206.

(c) *Hydroelectric small power production facilities located at a new dam or diversion*—(1) *General rule.* Except as provided in paragraph (c)(2) of this section and § 292.208 of this part, a hydroelectric small power production facility that impounds or diverts the water of a natural water course by means of a new dam or diversion is a qualifying facility if:

(i) It meets the requirements in paragraph (a) of this section;

(ii) The Commission finds that the project will not have substantial adverse effects on the environment, including recreation and water quality, when it issues the license or exemption for the project;

(iii) The Commission finds, when it accepts the application for license or exemption for the project for filing under § 4.32(e) of this chapter, that the project is not located on any segment of a natural watercourse that:

(A) Is included in (or designated for potential inclusion in) a State or National Wild and Scenic River System, or

(B) The State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural or scenic attributes which would be adversely affected by hydroelectric development; and

(iv) The project meets the terms and conditions set by the appropriate fish and wildlife agencies under the same procedures as provided for under section 30(c) of the Federal Power Act.

(2) *Exception.* A hydroelectric small power production facility that impounds or diverts the water of a natural watercourse by means of a new dam or diversion is not a qualifying facility if the moratorium described in section 3(e) of the Electric Consumer Protection Act of 1986 (ECPA), Pub. L. No. 99-495, is in effect. The moratorium applies to a license or an exemption issued on or after October 16, 1986. The moratorium will end at the expiration of the first full session of Congress following the session during which the Commission reports to Congress on the results of the study required under section 3(d) of ECPA.

§292.204 Criteria for qualifying small power production facilities.

(a) *Size of the facility*—(1) *Maximum size.* The power production capacity of the facility for which qualification is sought, together with the capacity of any other facilities which use the same energy resource, are owned by the same person, and are located at the same site, may not exceed 80 megawatts.

(2) *Method of calculation.* (1) For purposes of this paragraph, facilities are considered to be located at the same site as the facility for which qualification is sought if there are located within one mile of the facility for which qualification is sought and for hydroelectric facilities, if they use water from the same impoundment for power generation.

(ii) For purposes of making the determination in clause (1), the distance between facilities shall be measured from the electrical generating equipment of a facility.

(3) *Waiver.* The Commission may modify the application of paragraph (a)(2) of this section, for good cause.

(b) *Fuel use.* (1) (i) The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.

(ii) Any primary energy source which, on the basis of its energy content is 50 percent or more biomass shall be considered biomass.

(2) Use of oil, natural gas, and coal by a facility may not, in the aggregate exceed 25 percent of the total energy input of the facility during any calendar year period.

§292.205 Criteria for qualifying cogeneration facilities.

(a) *Operating and efficiency standards for topping-cycle facilities*—(1) *Operating standard.* For any topping-cycle cogeneration facility, the useful thermal energy output of the facility must, during any calendar year period be no less than 5 percent of the total energy output.

(2) *Efficiency standard.* (i) For any topping-cycle cogeneration facility for which any of the energy input is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility plus one-half the useful thermal energy output, during any calendar year period, must:

(A) Subject to paragraph (a)(2)(1)(B) of this section be no less than 42.5 percent of the total energy input of natural gas and oil to the facility; or

(B) If the useful thermal energy output is less than 15 percent of the total energy output of the facility, be no less than 45 percent of the total energy input of natural gas and oil to the facility.

(ii) For any topping-cycle cogeneration facility not subject to paragraph (a)(2)(1) of this section there is no efficiency standard.

(b) *Efficiency standards for bottoming-cycle facilities.* (1) For any bottoming-cycle cogeneration facility for which any of the energy input as supplementary firing is natural gas or oil and the installation of which began on or after March 13, 1980, the useful power output of the facility must, during any calendar year period, be no less than 45 percent of the energy input of natural gas and oil for supplementary firing.

(2) For any bottoming-cycle cogeneration facility not covered by paragraph (b)(1) of this section, there is no efficiency standard.

(c) *Waiver.* The Commission may waive any of the requirements of paragraphs (a) and (b) of this section upon a showing that the facility will produce significant energy savings.

§292.206 Ownership criteria.

(a) *General rule.* A cogeneration facility or small power production facility may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

(b) *Ownership test.* For purposes of this section, a cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding company, or companies, or any combina-

tion thereof. If a wholly or partially owned subsidiary of an electric utility or electric utility holding company has an ownership interest of a facility, the subsidiary's ownership interest shall be considered as ownership by an electric utility or electric utility holding company.

(c) *Exceptions.* For purposes of this section a company shall not be considered to be an "electric utility" company if it:

(1) Is a subsidiary of an electric utility holding company which is exempt by rule or order adopted or issued pursuant to section 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935 is 15 USC 79c(a)(3), 79c(a)(5) or

(2) Is declared not to be an electric utility company by rule or order of the Securities and Exchange Commission pursuant to section 2(a)(3)(A) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(3)(A).

§292.207 Procedures for obtaining qualifying status.

(a) *Qualification.* (1) A small power production facility or cogeneration facility which meets the criteria for qualification set forth in 292.203 is a qualifying facility.

(2) The owner or operator of any facility qualifying under this paragraph shall furnish notice to the Commission providing the information set forth in paragraphs (b)(2) (i) through (iv) of this section.

(b) *Optional procedure*—(1) *Application for Commission certification.* Pursuant to the provisions of this paragraph, the owner or operator of the facility may file with this Commissioner an application for Commission certification that the facility is a qualifying facility.

(2) *General contents of application.* The application shall be accompanied by the fee prescribed by Part of this chapter and shall contain the following information:

(i) The name and address of the applicant and location of the facility;

(ii) A brief description of the facility, including a statement indicating whether such facility is a small power production facility or a cogeneration facility;

(iii) The primary energy source used or to be used by the facility;

(iv) The power production capacity of the facility; and

(v) The percentage of ownership by any electric utility or by any electric utility holding company, or by any person owned by either.

(3) *Additional application requirements for small power production facilities.* An application by a small power producer for Commission certification shall contain the following additional information:

(i) The location of the facility in relation to any other small power production facilities located within one mile of the facility, owned by the applicant which use the same energy source; and

(ii) Information identifying any planned usage of natural gas, oil or coal.

(4) *Additional application requirements for cogeneration facilities.* An application by a cogenerator for Commission certification shall contain the following additional information:

(i) A description of the cogeneration system, including whether the facility is a topping or bottoming cycle and sufficient information to determine that any applicable requirements under §292.205 will be met; and

(ii) The date installation of the facility began or will begin.

(5) *Commission action.* Within 90 days of the filing of an application, the Commission shall issue an order granting or denying the application, tolling the time for issuance of an order, or setting the matter for hearing. Any order denying certification shall identify the specific requirements which were not met. If no order is issued within 90 days of the filing of the complete application, it shall be deemed to have been granted.

(6) *Notice.* (i) Applications for certification filed under this paragraph shall include a copy of a notice of the request for certification for publication in the FEDERAL REGISTER. The notice shall state the applicant's name, the date of the application, and a brief description of the facility for which qualification is sought. This description shall include:

(A) A statement indicating whether such facility is a small power production facility or a cogeneration facility;

(B) The primary energy source used or to be used by the facility;

(C) The power production capacity of the facility; and

(D) The location of the facility.

(ii) The notice shall be in the following form:

(Name of Applicant)
Docket No. QF-

NOTICE OF APPLICATION FOR COMMISSION CERTIFICATION OF QUALIFYING STATUS OF A (SMALL POWER PRODUCTION) (COGENERATION) FACILITY

On (date application was filed), (name and address of applicant) filed with the Federal Energy Regulatory Commission an application to be certified as a qualifying (small power production) (cogeneration) facility pursuant to §292.207 of the Commission's rules.

(Brief description of the facility).

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 325 North Capitol Street, N.E. Washington, D.C. 20426, in accordance with §§385.209 and 385.214 of this chapter. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

(c) Notice requirements for facilities of 500 kW or more. An electric utility is not required to purchase electric energy from a facility with a design capacity of 500 kW or more until 90 days after the facility notifies the utility that it is a qualifying facility, or 90 days after the facility has applied to the Commission under paragraph (b) of this section.

(d) In Revocation of qualifying status.

(1) The Commission may revoke the qualifying status of a qualifying facility which has been certified under this section if such facility fails to comply with any of the statements contained in its application for Commission certification.

(2) Prior to undertaking any substantial alteration or modification of a qualifying facility which has been certified under this section, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification will not result in a revocation of qualifying status.

§292.208 Exceptions from requirements for hydroelectric small power production facilities located at a new dam or diversion.

(a) The requirements of §292.203(c)(1) (ii) through (iv) of this part do not apply if:

(1) An application for license or exemption is filed for a project located at a Government dam, as defined in section 3(10) of the Federal Power Act, at which non-Federal hydroelectric development is permissible; or

(2) An application for license or exemption was filed and accepted before October 16, 1986.

(b) The requirements of §292.203(c)(1) (ii) and (iv) of this part do not apply if an application for license or exemption was filed before October 16, 1986 and is accepted for filing by the Commission before October 16, 1989.

(c) The requirements of §292.203(c)(1) (iv) of this part do not apply to an applicant for license or exemption that filed a petition pursuant to §292.209 of this part, if that petition is granted.

(d) Any application covered by paragraph (a), (b), or (c) of this section is excepted from the moratorium imposed by section 8(e) of the Electric Consumers Protection Act of 1986, Pub. L 99-495.

§292.209 Petition alleging commitment of substantial monetary resources before October 16, 1986.

(a) An applicant covered by §292.203(c) of this part whose application for license or exemption was filed on or after October 16, 1986, but before April 16, 1988, may file a petition for §292.203 (c)(1) (iv) and 292.203(c)(2) of this part. The petition must show a commitment of substantial monetary resources, as defined in paragraph (b) of this section, on the project before October 16, 1986. Subject to rebuttal, a showing of the commitment of substantial monetary resources will be presumed if the

applicant held a preliminary permit for the project and had completed environmental consultations pursuant to §4.38 of this chapter before October 16, 1986.

(b) "Commitment of substantial monetary resources" means the expenditure of, or commitment to expend, at least 50 percent of the total cost of preparing an application for license or exemption for a hydroelectric project that is accepted for filing by the Commission pursuant to §4.32(e) of this chapter. The total cost includes (but is not limited to) the cost of agency consultation, environmental studies, and engineering studies conducted pursuant to §4.36 of this chapter, and the Commission's requirements for filing an application for license or exemption.

(c) *Time of filing petition*—(1) General rule. Except as provided in paragraph (c)(2) of this section, the applicant must:

(i) File the petition with the application for license or exemption; or

(ii) Submit with the application for license or exemption a request for an extension of time, not to exceed 90 days or April 16, 1988, whichever occurs first, in which to file the petition.

(2) *Exception.* If the application for license or exemption was filed on or after October 16, 1986, but before March 23, 1987, the petition must be filed by June 22, 1987.

(d) *Filing requirements.* A petition filed under this section must include the following information or refer to the pages in the application for license or exemption where it can be found:

(1) A certificate of service, conforming to the requirements set out in §385.2010(h) of this chapter, certifying that the applicant has served the petition on the Federal and State agencies required to be consulted by the applicant pursuant to §4.38 of this chapter;

(2) Documentation of any issued preliminary permits for the project;

(3) An itemized statement of the total costs expended on the application;

(4) An itemized schedule of costs the applicant expended or committed to be expended, before October 16, 1986 on the application, accompanied by supporting documentation including but not limited to;

(1) Dated invoices for maps, surveys, supplied, geophysical and geotechnical services, engineering services, legal services, document reproduction, and other items related to the preparation of the application, and

(ii) Written contracts and other written documentation demonstrating a commitment made before October 16, 1986, to expend monetary resources on the preparation of the application, together with evidence that those monetary resources were actually expended; and

(5) Correspondence or other documentation to support the items listed in paragraphs (d)(3) and (d)(4) of this section to show that the expenses presented were directly related to the preparation of the application.

(6) The applicant must include in its total costs statement and in its schedule of the costs expended or committed to be expended before October 16, 1986, the value of services that were performed by the applicant itself instead of contracted out.

(7) If the applicant held a preliminary permit for the project and had completed pre-filing consultation pursuant to §4.38 of this chapter before October 16, 1986, instead of submitting the information listed in paragraphs (d) (3), (4), and (5) of this section, the applicant may submit a statement identifying the preliminary permit by project number.

(8) If the application is deficient pursuant to §4.32(d) of this chapter, the applicant must include with the information correcting those deficiencies a statement of the costs expended to make the corrections.

(e) *Processing of petition.* (1) The Commission will issue a notice of the petition filed under this section and publish the notice in the FEDERAL REGISTER. The petition will be available for inspection and copying during regular business hours in the public reference room maintained by the Division of Public Information.

(2) *Comments on the petition.* The Commission will provide the public within 45 days from the date the notice is issued to submit comments. The applicant for license or exemption may answer any comments filed during that period no later than 15 days after the expiration of the public comment period.

(3) *Commission action on petition.* The director of the Office of Hydropower Licensing will determine whether or not the applicant for license or exemption has made the showing required under this section.

18 CFR Section 292.304(b). Rates for purchases

(b) *Relationship to avoided costs.* (1) For purposes of this paragraph, "new capacity" means any purchase from capabity of a qualifying facility, construction of which was commenced on or after November 9, 1978.

(2) Subject to paragraph (b)(3) of this section, a rate for purchases satisfies the requirements of paragraph (a) of this section if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section.

(3) A rate for purchases (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has ratemaking

authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section, and is sufficient to encourage cogeneration and small power production.

(4) Rates for purchases from new capacity shall be in accordance with paragraph (b)(2) of this section, regardless of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility.

(5) In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.

Maine Public Utility Commission Rules and Regulations, Chapter 36, sections 1(A)(25), 2.

§1 GENERAL PROVISIONS

A. *Definitions.* Terms defined in the Public Utility Regulatory Policies Act of 1978 (PURPA), Public Law 95-617, shall have the same meaning for purposes of this chapter as they have under PURPA, unless further defined in this chapter. In addition the following definitions apply for purposes of this chapter. . .

25. "Qualifying facility" means any small power producer or cogenerator which meets the criteria set forth in section 2 of this chapter.

§2 QUALIFYING COGENERATION AND SMALL POWER PRODUCTION FACILITIES

A. *General Requirements for Qualification.*

1. *Small power production facilities.* A small power production facility is a qualifying facility if it:

a. meets the size criteria specified in §2(B)(1);

b. meets the fuel use criteria specified in §2(B)(2); and

c. meets the ownership criteria specified in §2(D).

2. *Cogeneration facilities.* A cogeneration facility is a qualifying facility if it:

a. meets the applicable operating and efficiency standards specified in §2(C); and

b. meets the ownership criteria specified in §2(D).

B. *Criteria for Qualifying Small Power Production Facilities.*

1. *Size of the facility.*

a. *Maximum size.* The power production capacity of the facility for which qualification is sought, together with the capacity of any other facilities which use the same energy resource, are owned by the same person, and are located at the same site, may not exceed 80 megawatts.

b. *Method of calculation.* For purposes of this paragraph, facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought and, for hydroelectric facilities, if they use water from the same impoundment for power generation. For purposes of making this determination the distance between facilities shall be measured from the electrical-generating equipment of a facility.

2. *Fuel use.*

a. The primary energy source of the facility must be biomass, waste, renewable resources, or any combination thereof, and more than 75 percent of the total energy input must be from these sources. Any primary energy sources which, on the basis of its energy content, is 50 percent or more biomass shall be considered biomass.

b. Use of oil, natural gas, and coal by a facility may not, in the aggregate, exceed 25 percent of the total energy input of the facility during any calendar-year period.

C. *Criteria for Qualifying Congeneration Facilities.*

1. *Operating and efficiency standards for topping-cycle facilities.*

a. *Operating standard.* For any topping-cycle cogeneration facility, the useful thermal energy output of the facility must, during any calendar-year period, be no less than 5 percent of the total energy output.

b. *Efficiency standard.* For any topping-cycle cogeneration facility for which any of the energy input is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility plus one-half of the useful thermal energy output, during any calendar-year period, must:

i) subject to §2(C)(1)(b)(ii), be no less than 42.5 percent of the total energy input of natural gas and oil to the facility; or

ii) if the useful thermal energy output is less than 15 percent of the total energy output of the facility, be no less than 45 percent of the total energy input of natural gas or oil to the facility; or

iii) for any topping-cycle cogeneration facility not subject to subsection 2(C)(1)(b) there is no efficiency standard.

2. *Efficiency standards for bottoming-cycle facilities.*

a. For any bottoming-cycle cogeneration facility for which any of the energy input as supplementary firing is natural gas or oil, and the installation or which begin on or after March 13, 1980, the useful power output of the facility must, during any calendar-year period, be no less than 45 percent of the energy input of natural gas or oil for supplementary firing.

3. *Waiver.* The Commission may waive any of the requirements of paragraphs (1) and (2) of this subsection upon a showing that the facility will consume significantly less energy than would be consumed by the facility and the electric utility if the cogeneration facility were not constructed.

D. *Ownership Criteria.*

1. *General rule.* A cogeneration facility or small power production facility may not be owned by a person primarily engaged in the generation or sale of electric power, other than electric power solely from cogeneration facilities or small power production facilities.

2. *Ownership test.*

a. For purposes of this section, a cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by a public utility holding company, or companies, or any combination thereof. If a wholly or partially owned subsidiary of an electric utility or public utility holding company has an ownership interest in a facility, the subsidiary's ownership interest shall be considered as ownership by an electric company or public utility holding company. For purposes of this section a company shall not

be considered to be an "electric utility" company if it is a subsidiary of an electric utility holding company which is exempt by rule of order adopted or issued pursuant to section 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79c(a)(3), 79c(a)(5); or is declared not to be an electric utility company by rule or order of the Securities and Exchange Commission pursuant to section 2(a)(3)(A) of the Public Utility Holding Company Act of 1935. 15 U.S.C. §79b(a)(3)(A).

b. Any electric utility that owns any part of a qualifying facility shall maintain separate records for all income investment and expenses associated with its ownership, operation or management of the qualifying facility.

E. *Exceptions.* Notwithstanding any provision of this section any small power producer or cogenerator which is considered to be a qualifying facility by the Federal Energy Regulatory Commission shall be deemed to be a qualifying facility for purposes of this chapter.

Maine Public Utililty Commission Rules and Regulations, Chapter 36, Section 4(C).

C. *Rates for Purchases.*

1. *General Provisions*

a. Rates for purchases shall:

i) be just and reasonable with respect to the electric consumer of the electric utility and in the public interest; and

ii) not discriminate against qualifying cogeneration and small power production facilities.

b. Nothing in this section requires any electric utility to pay more than its avoided costs for purchases nor shall this chapter be construed to limit or otherwise discourage an electric utility

or qualifying facility from negotiating any reasonable price or other contract terms agreeable to the utility and the qualifying facility.

2. *Relationship to avoided costs.*

a. With respect to purchases of energy made by electric utilities from qualifying facilities pursuant to a contract for a period of less than five years the rates established by the Commission shall equal the avoided energy costs determined in accordance with section 3(B) after consideration of the factors set forth in paragraphs 7 and 8 of this subsection.

b. With respect to purchases of energy and capacity made pursuant to a contract for a term of five (5) years or longer, rates established by the Commission shall reflect the utility's avoided energy costs and the utility's avoided capacity costs determined in accordance with section 3(C) after consideration of the factors set forth in paragraphs 7 and 8 of this subsection.

c. Rates for purchases from new capacity shall be in accordance with this section regardless of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility. Simultaneous purchases and sales from existing capacity are prohibited unless specifically authorized by the Commission.

d. In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of a contract, the rates for such purchases do not violate this chapter if the rates for such purchases differ from avoided costs at the time of delivery.

e. In the event contracts are offered for periods of more than fifteen years, the net present value of the rates shall not exceed the utility's levelized avoided cost for the initial 15 years of the contract.

3. *Standard rates for purchases.*

a. Standard rates for purchases of energy by a utility will be established by the Commission in every fuel adjustment proceeding for that utility. These rates will be available for the duration of the fuel adjustment charge to any qualifying facility with an installed capacity of 1,000 kilowatts or less that elects to sell energy as available and that has been unable to reach a negotiated price with the electric utility. Except as modified by the Commission's consideration of the factors set forth in paragraph 7 of this subsection, standard rates for purchases of energy shall equal the purchasing utility's avoided energy costs determined in accordance with section 3(B). Separate time differentiated and average rates will be established. Rates for the purchase of energy pursuant to a contract for a period greater than five years will be established by the Commission only upon petition filed in accordance with section 6.

b. Standard rates for purchases of energy and capacity sold by a qualifying facility pursuant to § 5, 10, 15, or 18-year contract will be established by the Commission after review of the filing of avoided cost data filed by the utility pursuant to section 3(C) of this chapter. These rates will be available to any qualifying facility that has an installed capacity of 1,000 kilowatts or less than has been unable to negotiate a contract with the electric utility. Separate time differentiated rates shall be established.

c. Standard rate established pursuant to subsections (a) and (b) above will correspond to the blocks described in section 3(B)(1) and 3(C)(5). In determining whether the standard rates for a block have been committed and thus no longer available to qualifying facilities, the Commission will compare the total avoided cost associated with a block to the total estimated cost of the purchases from qualifying facilities that have executed contracts since the standard rates were established.

d. These standard rates will be subject to the terms and conditions set forth in standard contracts filed and approved pursuant to paragraph 5 of this subsection.

e. Rates for purchases from qualifying facilities with an installed capacity greater than 1,000 kilowatts, and rates for contracts longer than 18 years will be established by the Commission upon petition pursuant to section 6 of this chapter.

f. Standard rates for qualifying facilities in the fourth decrement of 1984 of CMP with an installed capacity of 1000 kw or less are determined to be as stated below for the periods indicated:

Year	Price (cts/kWh)	Level Rate
1984	4.69	
1985	5.03	
1986	6.18	
1987	6.43	
1988	6.99	5.72
1989	7.57	
1990	8.18	
1991	5.67	
1992	8.53	
1993	8.70	6.43
1995	7.30	
1996	6.08	
1997	10.05	
1998	11.47	6.80

4. *Net Energy Billing.*

a. Any qualifying facility that has an installed capacity of 100 KW or less may at its option sell electricity to an electric utility on a net energy billing basis.

b. Net energy sales during any billing period shall be at rates established pursuant to paragraph 3 of this subsection.

c. Nothing in this paragraph shall prohibit a utility from installing additional meters to record purchases and sales sep-

arately, provided, however, that no qualifying facility which elects to sell electricity on a net energy billing basis shall be charged for the cost of the additional meters or other necessary equipment.

5. *Standard contracts.*

a. Each utility shall file one or more standard contracts within sixty (60) days from the effective date of this rule under which it will agree to purchase energy or capacity or both from qualifying facilities with installed generating capacity of 1,000 kilowatts or less. Such standard contracts shall include all terms and conditions applicable to the utility's purchase of energy and capacity.

b. Each utility may file one or more standard contractual provisions under which it will agree to purchase energy or capacity or both from qualifying facilities with installed generating capacity greater than 1,000 kilowatts. The filing shall include the conditions under which the provisions would apply to the purchase.

c. Standard contract terms filed pursuant to subparagraphs (a) and (b) above shall be subject to Commission modification and approval following public notice in accordance with section 6 of this chapter. No such modification shall affect enforceable contracts already executed between qualifying facilities and utilities.

6. *Purchases "as available" or pursuant to a legally enforceable contract.* Each qualifying facility shall have the option either:

a. To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates established by the Commission for such purchases shall be based on the purchasing utility's avoided energy costs determined in accordance with section 3(B) at the time delivery commences; or

b. To provide energy or capacity pursuant to a legally enforceable contract for the delivery of energy or energy and capacity over a specified term, in which case the rates established by the Commission for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

i) the avoided costs as estimated at the time delivery commences; or

ii) the avoided costs as estimated at the time the obligation is incurred.

c. Nothing in this subsection shall restrict the rights of any utility or qualifying facility to enter into agreements under which rates are established on a basis other than those specified in this subsection including, but not limited to, rates which are subject to periodic adjustment provided, however, that the rate shall not have been estimated so as to exceed the utility's avoided cost over the term of the contract. A qualifying facility which has a legally enforceable contract is not prohibited from selling additional energy in accordance with the provisions of this rule.

7. *Factors affecting rates for purchases of energy*, in determining rates for purchase of energy, the Commission will consider the following factors to the extent practicable.

a. The data provided pursuant to section 3(A) of this chapter.

b. The availability of energy from a qualifying facility during on-peak and off-peak periods.

c. The ability of the utility to dispatch the qualifying facility. If the utility is able to dispatch the output of the qualifying facility, without reducing the total energy production of the qualifying facility, the avoided energy cost data submitted by the utility or the energy portion of the standard rates published

by the Commission shall be increased 3 percent unless otherwise ordered by the Commission.

d. The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities. If the utility is able to schedule the maintenance of the qualifying facility, the avoided energy cost data submitted by the utility or the energy portion of the standard rates published by the Commission shall be increased 1 percent unless otherwise ordered by the Commission.

e. The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility itself generated an equivalent amount of energy or purchased an equivalent amount of electric energy or capacity. Unless otherwise ordered by the Commission, the rates established for purchases from any specific qualifying facility shall be increased to reflect the same level of line losses as used to establish retail rates for any class of customer that is served at a similar voltage level.

f. The usefulness of energy supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation.

8. *Factors affecting rates for purchases of energy and capacity.* In establishing rates for the purchase of capacity and energy the Commission will consider the factors discussed in subsection 7 above and, in addition, will consider the following factors to the extent practicable.

a. The data provided pursuant to section 3(B) of this chapter.

b. The availability of capacity from a qualifying facility during on-peak and off-peak periods.

c. The expected or demonstrated reliability of the qualifying facility.

d. The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance.

e. The individual and aggregate value of capacity from qualifying facilities on the electric utility's system.

f. The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities.

9. When the Commission determines standard rates pursuant to paragraph 2 of this subsection, the Commission will aggregate qualifying facilities and treat them as one in considering the factors listed in paragraphs 7 and 8.

APPENDIX I—Amended Complaint (without exhibits).

STATE OF NEW YORK, SUPREME COURT

COUNTY OF ONONDAGA

ALLIED CHEMICAL, an Operating Unit of Allied Corporation,

Plaintiff,

against

NIAGARA MOHAWK POWER CORPORATION and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Defendants.

Index No. 86-3224

Assigned Judge, Donald H. Miller.

The plaintiff, Allied Chemical, an operating unit of Allied Corporation (now the Engineered Materials Sector of Allied Corporation and hereinafter referred to as Allied), as and for its amended complaint alleges:

1. Allied owns and operates an electric generating station and cogeneration facility, located in the Town of Geddes, New York for use in the operation of its manufacturing plant and has offices at Solvay, New York. Allied is a qualifying facility under the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. § 2601 *et seq.*).

2. Upon information and belief, defendant Niagara Mohawk Power Corporation (Niagara Mohawk) is a gas and elec-

tric corporation duly organized and existing under the laws of the State of New York having its principal office and place of business at 300 Erie Boulevard West, Syracuse, New York 13202.

3. Defendant Public Service Commission of the State of New York (PSC or Commission), is an administrative body existing within the New York State Department of Public Service with its principal office located in the County of Albany, State of New York.

4. On or about October 1, 1981, plaintiff and defendant Niagara Mohawk entered into a contract for the purchase by Niagara Mohawk of excess electric power produced at Allied's cogeneration facility. A copy of the contract is annexed hereto and made a part hereof as Exhibit "A". An additional contract was signed on or about November 1, 1981 for the provision of back-up electric service from Niagara Mohawk to Allied.

5. The October 1, 1981 agreement between Niagara Mohawk and Allied states:

> It is further provided that either party may elect to replace the price for energy as specified above with an applicable rate specified by the New York State Public Service Commission either in a general tariff approved by the Commission or upon petition by either party to this AGREEMENT. (Exhibit "A", p. 3)

6. This clause, which clearly gives Allied the right of election, was included in the contract pursuant to an order of the Public Service Commission, Case 27824, issued January 7, 1981. The order, implementing a federal statute encouraging cogeneration, required Niagara Mohawk to include an election provision in any contract for cogenerated power. A copy of the order is annexed hereto and made a part hereof as Exhibit "B".

7. In Case 27574, On-Site Generation Proceeding, Niagara Mohawk was directed to file a tariff with the Commission establishing rates for purchases of cogenerated power from qualifying facilities. On November 21, 1983, Niagara Mohawk made its compliance filing consisting of two new Service Classifications of PSC No. 207 Electricity: SC-6—Purchase of Electric Energy and Capacity from Customers with Qualifying On-Site Generation Facilities; and SC-7—Sale of Supplemental, Back-up and Maintenance Service to Customers with On-Site Generation Facilities. A copy of the tariff is annexed hereto and made a part hereof as Exhibit "C".

8. On March 20, 1984, Allied requested that the rate for purchases by Niagara Mohawk and the rate for back-up service be set pursuant to Niagara Mohawk's filed tariff No. 207, Service Classifications 6 and 7. A copy of the letter is annexed hereto and made a part hereof as Exhibit "D". Allied made such election under the express terms of the contract.

9. Niagara Mohawk rejected Allied's request by a letter to Allied dated April 18, 1984. In addition, Niagara Mohawk filed a Petition for a Declaratory Ruling with the Commission on April 5, 1984. This filing sought a ruling on whether Niagara Mohawk was entitled to grant Allied's exercise of its contractual election provision. A copy of the Petition is annexed hereto and made a part hereof as Exhibit "E".

10. On June 19, 1984, Allied filed a Counterpetition for a Declaratory Ruling with the Commission requesting a ruling on Niagara Mohawk's obligation to honor Allied's rate election. A copy of the Counterpetition is annexed hereto and made a part hereof as Exhibit "F".

11. On June 19, 1984, Allied filed a Complaint requesting an order from the Commission requiring Niagara Mohawk to purchase power from Allied's cogeneration facility at the filed rate of SC-6, PSC 207 Electricity, effective March 20, 1984 and to sell back-up service to Allied under SC-7, effective March

20, 1984. A copy of the Complaint is annexed hereto and made a part hereof as Exhibit "G".

12. Niagara Mohawk filed a Response to the Complaint and Counterpetition of Allied on July 12, 1984. A copy of the Response is annexed hereto and made a part hereof as Exhibit "H".

13. On January 22, 1985, the Commission issued a Notice and proposed Policy Statement in Response to the Petition and Counterpetition for declaratory rulings. A copy of the Notice and proposed Policy Statement is annexed hereto and made a part hereof as Exhibit "I". The proposed policy statement found that Allied's facility is not prospectively entitled to rates set pursuant to Niagara Mohawk's Service Classification 6 tariff. Niagara Mohawk also was directed to submit draft tariff amendments that would establish rates for facilities such as Allied's not eligible for SC-6. The proposed policy statement found, however, that Allied was entitled to SC-7 rates for back-up service (Exhibit I, p. 9). On March 22, 1985, Allied filed comments in opposition to the Commission's proposed policy statement.

14. On February 14, 1986, the Commission issued its "Policy Statement Applicable To Qualifying Facilities That Provide Old Capacity". A copy of the policy statement is annexed hereto and made a part hereof as Exhibit "J". The policy statement generally affirms, with some modifications, the proposed policy statement. The policy statement requires that each utility file tariffs containing a rate applicable to purchases from old capacity facilities, subsequent to the issuance of the policy statement, initially equal to 50 percent of full avoided costs, increasing over a ten year phase-in period to full avoided costs. The policy statement expressly states that this is the first time that the Commission has considered the distinction between rates for old and new capacity (Exhibit "J", pp. 7-8).

15. Although the policy statement and tariffs filed in compliance will govern rates for purchases made after the February

14, 1986 issuance date of the policy statement, the October 1, 1981 contract between Allied and Niagara Mohawk is binding for all periods prior to February 14, 1986.

16. By the express terms of the contract, Allied is entitled to elect "the applicable rate specified by the New York State Public Service Commission . . . in a general tariff approved by the Commission." The filed tariff, No. 207, SC-6 and SC-7, by its own terms was the only "applicable rate" available during the period from Allied's election on March 20, 1984 to the February 14, 1986 issuance date of the policy statement by the Commission.

17. Allied accordingly is entitled to the rates set by the filed tariff, No. 207, SC-6 and SC-7, from the date of Allied's election, March 20, 1984, to February 14, 1986, the issuance date of the policy statement by the Commission.

18. By periodic letter invoices, Allied has notified Niagara Mohawk of the amounts due Allied for sale of electric power to Niagara Mohawk under SC-6 from the date of Allied's election. The amounts due noted in these letters were calculated from estimates of "on peak" and "off peak" SC-6 rates in lieu of actual values not provided to Allied by Niagara Mohawk.

19. By letter dated January 27, 1986, Allied formally notified Niagara Mohawk of amounts due Allied for the sale of electric power to Niagara Mohawk from Allied under SC-6 for the period from March 20, 1984 to December 2, 1985 and for purchases on SC-2 by Allied from Niagara Mohawk rather than on SC-7. A copy of the letter is annexed hereto and made a part hereof as Exhibit "K".

20. By letter dated February 24, 1986, Niagara Mohawk responded to Allied's January 27, 1986 letter and asserted that the Commission's policy statement negated the claim of damages for the period from Allied's election of SC-6 in March, 1984 to the issuance of the policy statement on February 14, 1986 and for all subsequent periods. Niagara Mohawk erro-

neously claims that there was no other applicable rate for Allied other than the contractual rate prior to the issuance of the policy statement. In the letter, Niagara Mohawk acknowledges that Allied has been incorrectly charged for back-up service under SC-2 and agreed to recalculate past bills at the SC-7 rate. A copy of the letter is annexed hereto and made a part hereof as Exhibit "L".

21. During the period from March 22, 1984 to February, 14, 1986 as a direct consequence of the conduct of Niagara Mohawk as hereinbefore set forth, Allied has been paid for purchases by Niagara Mohawk at a rate less than that established by SC-6. Allied has accordingly been damaged in an amount approximately equal to $1,535,192.48. In addition, PSC 207 provides that interest accrues on all amounts outstanding over thirty days.

WHEREFORE, the plaintiff demands judgment against the defendant Niagara Mohawk Power Corporation for $1,535,192.48 plus accrued interest and for such other and further relief as the court deems just and proper, together with the costs and disbursements of this action.

Dated: July 30, 1986

Yours, etc.

THE LAW OFFICES OF ALGIRD F. WHITE, JR.
Attorneys for Plaintiff
One Steuben Place, Box 314
Albany, New York 12201
Tel. (518) 434-1161

APPENDIX J—Affidavit of James W. McTarnaghan in Opposition to Niagara Mohawk Power Corporation's Motion to Dismiss (without exhibits).

STATE OF NEW YORK, SUPREME COURT

COUNTY OF ONONDAGA

ALLIED CHEMICAL, an Operating Unit of Allied Corporation,

Plaintiff,

against

NIAGARA MOHAWK POWER CORPORATION,

Defendant.

Index No. 86-3224

Assigned Judge: Donald H. Miller

STATE OF NEW YORK:
: SS.:
COUNTY OF ALBANY:

JAMES W. McTARNAGHAN, being duly sworn, deposes and says:

1. I am an attorney associated with the Law Offices of Algird F. White, Jr., attorneys for plaintiff, Allied Chemical, an operating unit of Allied Corporation ("Allied"), and make this affidavit in opposition to the motion of defendant Niagara Mohawk Power Corporation ("Niagara Mohawk") to dismiss

the complaint and in response to the affidavit of John W. Dax in support of the motion of Niagara Mohawk.

2. This action was commenced by service of a Summons and Complaint on the Secretary of State on April 29, 1986. A copy of the Summons and Complaint is annexed hereto as Exhibit "1" and made a part hereof.

3. By notice of motion and accompanying affidavit of John W. Dax, dated May 28, 1986, Niagara Mohawk has moved to dismiss the Complaint purportedly on the grounds that (a) the matter was previously decided by the New York State Public Service Commission ("Public Service Commission") and its decision is *res judicata;* (b) this Court lacks subject matter jurisdiction, because even if the prior decision is not *res judicata,* and even if the Court does have subject matter jurisdiction, it should defer judgment on this issue to the Public Service Commission which has primary jurisdiction over the matter; and (c) an indispensable party, the Public Service Commission, has not been joined. (Dax Affidavit, p. 5).

4. Defendant has failed to state any grounds which justify the dismissal of the Complaint in this action.

5. On October 1, 1981 Allied and Niagara Mohawk entered into a contract for the purchase by Niagara Mohawk of excess electric power produced at Allied's cogeneration facility (see Exhibit "1", ¶s 1-3).

6. The October 1, 1981 agreement states:

> It is further provided that either party may elect to replace the price for energy as specified above with an applicable rate specified by the New York State Public Service Commission either in a general tariff approved by the Commission or upon petition by either party to this AGREEMENT.

(Exhibit "A', p. 3, to Exhibit "1" annexed hereto).

7. This clause, with its clear right of election, was included in the contract pursuant to an order of the Public Service Commission in Case 27824 (Exhibit "B" to Exhibit "1" annexed hereto). As indicated therein, the inclusion of the clause was required to comply with a federal statute encouraging cogeneration which required that qualifying facilities be provided rates for purchases equal to full avoided costs. See Exhibit "B" to Exhibit "1", p. 4.

8. Allied's facility is a qualifying facility under the federal statute. Because it was constructed prior to the effective date of the federal statute, the Allied facility is considered "old capacity". Federal regulations permit the establishment of rates set lower than the avoided cost level for purchases from certain qualifying facilities considered old capacity if, and only if, the state regulatory agency has found that such a rate is just and reasonable and provides necessary incentives. 18 C.F.R. §292.304(b)(3).

9. Pursuant to an order of the Public Service Commission in Case 27574, Niagara Mohawk was directed to file a tariff establishing rates for purchases by Niagara Mohawk of cogenerated power from qualifying facilities. Although the Public Service Commission could have chosen to establish that "old capacity" facilities would receive less than full avoided costs as provided in the federal regulations, the order in Case 27574 makes no distinction between rates for old and new capacity. Accordingly, until any subsequent ruling to the contrary, the tariffs filed pursuant to the order in Case 27574 applied uniformly to all qualifying facilities. Niagara Mohawk has not asserted that Allied's facility is not a qualifying facility. Rather, Niagara Mohawk's general claim is that because Allied is "old capacity" it is not entitled to the rate established for qualifying facilities.

10. On November 21, 1983, Niagara Mohawk made its compliance filing consisting in part of a new service classification of PSC No. 207 Electricity: SC-6—Purchase of Electric Energy and Capacity from Customers with Qualifying On-Site Genera-

tion Facilities (Exhibit "C" to Exhibit "1" annexed hereto). The SC-6 rate is set at the avoided cost level for Niagara Mohawk and is applicable to purchases by Niagara Mohawk of electric energy from qualifying facilities. Consistent with the Public Service Commission order in Case 27574, Niagara Mohawk's SC-6 tariff makes no distinction between old and new capacity. It was, by its terms and absent a contrary ruling, the "applicable rate" referenced in the October 1, 1981 agreement.

11. By letter dated March 20, 1984, Allied requested that the rate for purchases by Niagara Mohawk be set pursuant to Niagara Mohawk's filed tariff, SC-6. (Exhibit "D" to Exhibit "1" annexed hereto). Allied made such election under the express terms of its contract with Niagara Mohawk and chose SC-6 because it was then the only "applicable rate" and made no distinction between old and new qualifying facilities.

12. Following its refusal to honor Allied's election of the SC-6 rate, Niagara Mohawk filed a petition for a Declaratory Ruling with the Public Service Commission. Allied filed a counterpetition for a Declaratory Ruling and a complaint. Niagara Mohawk filed a response to the complaint. Copies of Niagara Mohawk's petition, Allied's counter-petition, Allied's complaint, and Niagara Mohawk's response are annexed hereto as Exhibits "E", "F", "G", "H" to Exhibit "1".

13. On January 22, 1985, the Public Service Commission issued a Notice and proposed Policy Statement in response to the petition and counterpetition for declaratory rulings (Exhibit "I" to Exhibit "1" annexed hereto).

14. On February 14, 1986, the Public Service Commission issued its "Policy Statement Applicable to Qualifying Facilities That Provide Old Capacity" (Exhibit "J" to Exhibit "1" annexed hereto). The policy statement requires that each utility file tariffs containing a rate applicable to purchases from "old capacity" facilities, subsequent to the issuance of the policy statement, initially equal to 50 percent of full avoided costs, increasing over a ten-year phase-in period to the full avoided

costs level. The policy statement expressly states that this is the first time that the Public Service Commission has considered the distinction between rates for old and new capacity (see Exhibit "J" to Exhibit "1", pp. 7-8).

(a) *Res Judicata*

15. This action seeks recovery of the difference between the contractual rate actually paid to Allied by Niagara Mohawk for the period March 20, 1984, when Allied elected the SC-6 rate, the only applicable rate, until February 14, 1986 when the Public Service Commission issued its final policy statement in which it ruled that Allied's facility is not prospectively entitled to Niagara Mohawk's SC-6 rate. Niagara Mohawk claims that the Complaint should be dismissed because "the matter was previously decided by the New York Public Service Commission which decision is *res judicata*" (Dax Affidavit, p. 5). To demonstrate *res judicata,* Niagara Mohawk must show that the issue of whether the SC-6 rate was the "applicable rate" during the contested period has been finally resolved by either the January 22, 1985 or the February 14, 1986 Commission orders. Niagara Mohawk has failed to make this showing. Allied contends that neither order addresses the issue of the applicable rate during the period following Allied's election of SC-6 until February 14, 1986 and cannot be considered a final and complete ruling.

16. Niagara Mohawk has implied that the January 22, 1985 Notice and Proposed Policy Statement contained a definitive ruling regarding the retroactive application of SC-6 to "old capacity" qualifying facilities such as Allied (Dax Affidavit, ¶14). To the contrary, the language contained in the January 22, 1985 proposed policy statement only prospectively limited the rate to Allied to the "applicable rate" which would ultimately be established in the final policy statement:

> With respect to the Niagara Mohawk-Allied dispute and the option clause contained in their purchase power agreement, our 1981 Order required the inclusion of

> such provisions in long-term contracts with qualifying facilities that are entitled to full avoided cost tariff rates pursuant to FERC's rules and regulations implementing Section 210 of PURPA. Utilities were not required to include this provision in any other contracts or under any other circumstances. Without a specific determination by us that Allied as a provider of old capacity, is entitled to full avoided costs, the S.C. No 6 tariff would not apply to the Niagara Mohawk-Allied contract. Nonetheless, with respect to Staff's proposed phase-in mechanism, Allied (and any other qualifying facility providing old capacity that entered into a similar agreement containing an option provision) would be allowed to begin to receive purchase rates pursuant to the staff proposal outlined above as soon as a tariff reflecting this mechanism is implemented by Niagara Mohawk.

(Exhibit "I" to Exhibit "1" at page 8). Niagara Mohawk's interpretation of this order as retroactively ruling that Allied's facility was not entitled to SC-6 rates or that the ruling precluded the use of SC-6 as the applicable rate prior to the issuance of a final policy statement or even the issuance of the tentative ruling would have the effect of nullifying the election clause of the contract between Allied and Niagara Mohawk. Allied is entitled to a choice by the clear terms of its contract. Any interpretation of the Public Service Commission actions which would render the choice meaningless cannot logically be valid.

17. Any ruling purportedly made in the January 22, 1985 Public Service Commission order is totally dependent on the proposed policy statement and cannot properly be segregated as a discreet ruling on the Niagara Mohawk-Allied dispute. Allied filed comments in opposition to the proposed policy statement on March 22, 1985. A copy of the comments is annexed hereto as Exhibit "2" and made a part hereof. Thus, any ruling regarding Allied and Niagara Mohawk tentatively included in the January 22, 1985 order was not final until the Public Service Commission approved the final policy statement on February 14, 1986. During both periods from March 20, 1984

to January 22, 1985 and from January 22, 1985 to February 14, 1986, the only "applicable rate" absent a contrary ruling by the Public Service Commission was SC-6 to which Allied had already properly elected.

18. The issuance of the final policy statement on February 14, 1986 was the first time that the Public Service Commission ruled that old capacity qualifying facilities such as Allied were eligible for an alternative rate ultimately reaching the full avoided cost SC-6 rate over a ten-year phase-in. Thus, this ruling was the first time that the Public Service Commission both ruled that the SC-6 rate was not prospectively available to Allied *and* established the alternative rate to which Allied is entitled by the election clause contained in its agreement with Niagara Mohawk. Given Allied's clear contractual right to elect an alternative rate to that provided by contract, the performance of both these actions was the prerequisite to a final ruling on the Allied-Niagara Mohawk dispute.

19. Correspondence with Niagara Mohawk indicates that prior to the instant motion, Niagara Mohawk shared the belief that the issue regarding prospective application of the SC-6 rate to "old capacity" qualifying facilities was not finally resolved until the issuance of the February 14, 1986 order.

20. By letter dated January 27, 1986, Allied formally notified Niagara Mohawk of amounts due Allied for the sale of electric power to Niagara Mohawk from Allied under SC-6 for the period from March 20, 1984 to December 2, 1985 (Exhibit "K" to Exhibit "1" annexed hereto). In response, by letter from John Dax dated February 6, 1986, Niagara Mohawk indicated that it would delay further response until issuance of the Commission's written order. A copy of the February 6, 1986 letter is annexed hereto as Exhibit "3" and made a part hereof.

21. Following the issuance of the final policy statement, Niagara Mohawk formally responded to Allied's inquiries and indicated that it believed that the final policy statement re-

solved the issue. A copy of the letter is annexed hereto as Exhibit "L" to Exhibit "1". This letter states in relevant part:

> The recent Policy Statement makes it clear that since March 1984, Allied has been entitled to payment at the contractual rate and no more. *As of the issuance of the Policy Statement,* an owner of old capacity under contract with a utility, which contract includes an election provision, is entitled to be paid at a rate equal to 50% of full avoided costs, as reflected, in Niagara Mohawk's case, in its SC-6 rate.

(Exhibit "L" to Exhibit "1", p. 2, emphasis added). This letter makes no reference to the January 22, 1985 letter as making a final ruling in the dispute regarding what the applicable rate is during the contested period.

22. Allied seeks damages only until February 14, 1986. Although not agreeing with the Public Service Commission's adoption of the final Policy Statement, Allied concedes, for purposes of this lawsuit, that the ruling was within the authority of the Public Service Commission and accepts the finding that old capacity rates may be less than full avoided costs for periods after February 14, 1986. However, as the basis of this action, Allied believes that it is entitled pursuant to the exercise of its clear contractual right of election, to recover the difference between the rate it received from Niagara Mohawk and SC-6, the only applicable rate, during the contested period prior to February 14, 1986. Neither the January 22, 1985 order nor the February 14, 1986 final Policy Statement have definitely ruled on this time period. *Res judicata* or collateral estoppel does not preclude the investigation of this issue here.

(b) Subject Matter Jurisdiction

23. Niagara Mohawk has further moved to dismiss the complaint for lack of subject matter jurisdiction (Dax Affidavit, p. 5). No basis is given for this assertion in the Dax affidavit. The accompanying memorandum of law asserts that the complaint

seeks untimely review of the Public Service Commission's January 22, 1985 ruling and that the complaint involves issues either exclusively within the original jurisdiction of the Public Service Commission or primarily the Public Service Commission's responsibility.

24. These assertions are incorrect. As apparent from the Complaint, this action seeks recovery only of damages resulting from Niagara Mohawk's breach of contract in refusing to honor Allied's election of the SC-6 rate during the period when SC-6 was the only applicable rate (Exhibit "1", p. 6). As such, the action poses a contractual issue which does not need the participation by or the expertise of the Public Service Commission.

25. The contractual issue presented here does not constitute untimely review of either the January 22, 1985 or the February 14, 1986 order. As discussed *supra,* ¶s 16-17, the January 22, 1985 order did not resolve the issue of which rate was applicable during the contested period. The February 14, 1986 order only prospectively rules that the Allied facility is not, as "old capacity", entitled to full avoided costs. Because any ruling regarding old capacity facilities could only be made final by providing a final determination that some other rate less than full avoided costs was an appropriate applicable rate to old capacity, the January 22, 1985 Public Service Commission order was not a final order appropriate for Article 78 review. The January 22, 1985 order merely stated the Public Service Commission's opinion tentatively in the form of a proposed policy statement which was subject to partial or total revision upon the review of comments submitted in response thereto. As the appropriate recourse to the January 22, 1985 order, Allied filed timely comments with the Public Service Commission on March 22, 1985. See Exhibit "2". Allied is not now seeking review of either the January 22, 1985 or the February 14, 1986 order and is asking this Court to act only in enforcing the clear contractual rights to which Allied is entitled for the contested period prior to the February 14, 1986 order.

26. Because the primary issue presented in the Complaint is purely contractual, it is properly before the Court rather than the Public Service Commission. The Complaint involves only one contract between Allied and Niagara Mohawk and in no way affects the prospective application of the February 14, 1986 policy statement. As such, the ratemaking authority of the Public Service Commission is not intruded upon by the Court's intervention in this proceeding. Allied seeks only an interpretation and enforcement of its contract with Niagara Mohawk in the same manner as any other dissatisfied contracting party. The Court is the appropriate forum for Allied to seek relief from the damages incurred by Niagara Mohawk's failure to perform within the terms of its contract.

(c) Indispensable Party

27. Niagara Mohawk's final purported basis for dismissal is its assertion that the Public Service Commission is an indispensable party (Dax Affidavit, p. 5). Niagara Mohawk has wholly failed to demonstrate facts which support this claim. As detailed *supra,* the issue presented by Allied in its Complaint is a purely contractual issue applicable only to the contested period prior to the Public Service Commission's February 14, 1986 ruling. As neither the rulings themselves nor the underlying policies of the Public Service Commission are impacted by a Court decision granting Allied the requested relief of damages for breach of contract, the Public Service Commission has no recognizable interest in this proceeding which might be inequitably affected by a judgment in the action. Only if Allied was demanding that the SC-6 rate be applied to it for periods after the February 14, 1986 ruling, which it is not, would the Public Service Commission conceivably have the requisite interest of an indispensable party.

28. In the event that defendant's motion is granted in whole or in part, the plaintiff desires leave to plead again.

WHEREFORE, the motion of the defendant to dismiss the complaint should be denied.

JAMES W. McTARNAGHAN

Sworn to before me this
19th day of June 1986
KATHLEEN M. HAUGHNEY
Notary Public, State of New York
Qualified in Albany County
No. 4856984
Commission Expires April 28, 1988

APPENDIX K—Affidavit of James W. McTarnaghan in Opposition to Public Service Commission's Motion for Summary Judgment (without exhibits).

STATE OF NEW YORK, SUPREME COURT

COUNTY OF ONONDAGA

ALLIED CHEMICAL, an operating unit of Allied Corporation,

Plaintiff,

against

NIAGARA MOHAWK POWER CORPORATION and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Defendants.

Index No. 86-3224

Assigned Judge: Donald H. Miller

STATE OF NEW YORK:
: SS.:
COUNTY OF ALBANY:

JAMES W. MCTARNAGHAN, being duly sworn, deposes and says:

1. I am an attorney associated with the Law Offices of Algird F. White, Jr., attorneys for plaintiff, Allied Chemical, an operating unit of Allied Corporation ("Allied"), and make this affidavit in opposition to the motion of defendant Public Serv-

ice Commission of the State of New York ("Commission") for summary judgment and in response to the affidavit of David E. Blabey in support of the motion of the Commission.

2. This action was originally commenced by service of a summons and complaint on April 29, 1986 in which Niagara Mohawk Power Corporation ("Niagara Mohawk") was named as a defendant.

3. By notice of motion and accompanying affidavit of John W. Dax, dated May 28, 1986, Niagara Mohawk moved to dismiss the complaint alleging as a ground, *inter alia,* failure to name the Commission as an indispensable party. Thereafter, plaintiff was directed to add the Commission as a party defendant. Niagara Mohawk's motion to dismiss on the remaining grounds was adjourned until September 18, 1986.

4. Plaintiff served a supplemental summons and amended complaint adding the Commission as a party defendant on July 30, 1986. A copy of the supplemental summons and amended complaint is annexed hereto as Exhibit "1" and made a part hereof.

5. On August 18, 1986, the Commission served its answer to the amended complaint in which it asserted two objections in point of law. A copy of the answer is annexed hereto as Exhibit "2" and made a part hereof.

6. By notice of motion and accompanying affidavit of David E. Blabey, dated September 5, 1986, the Commission moved for summary judgment purportedly on the grounds that (a) the matter had previously been decided by the Commission and its decision is *res judicata;* and (b) the action constitutes time-barred judicial review of the Commission's determination. Blabey Affidavit, ¶s 4-5; Exhibit "2", ¶s 14-19.

7. Defendant Public Service Commission has failed to state any grounds which justify summary judgment in this action.

8. On October 1, 1981 Allied and Niagara Mohawk entered into a contract for the purchase by Niagara Mohawk of excess electric power produced at Allied's cogeneration facility. See Exhibit "1", §4, annexed hereto.

9. The October 1, 1981 agreement states:

> It is further provided that either party may elect to replace the price for energy as specified above with an applicable rate specified by the New York State Public Service Commission either in a general tariff approved by the Commission or upon petition by either party to this AGREEMENT.

Exhibit "A", p. 3, to Exhibit "1" annexed hereto.

10. This clause, with its clear right of election, was included in the contract pursuant to an order of the Commission in Case 27824. Exhibit "B" to Exhibit "1" annexed hereto. As indicated therein, the inclusion of the clause was required to comply with a federal statute encouraging cogeneration which required that qualifying facilities be provided rates for purchases equal to full avoided costs. See Exhibit "B", p. 4, to Exhibit "1" annexed hereto.

11. Allied's facility is a qualifying facility under the federal statute. Because it was constructed prior to the effective date of the federal statute, the Allied facility is considered "old" capacity. Federal regulations permit the establishment of rates set lower than the avoided cost level for purchases from certain qualifying facilities considered "old" capacity if, and only if, the state regulatory agency has found that such a rate is just and reasonable and provides necessary incentives. 18 C.F.R. §292.304(b)(3).

12. Pursuant to an order of the Commission in Case 27574, Niagara Mohawk was directed to file a tariff establishing rates for purchases by Niagara Mohawk of cogenerated power from qualifying facilities. Although the Commission could have

chosen to establish that "old" capacity would receive less than full avoided costs as provided in the federal regulations, the order in Case 27574 made no distinction between rates for "old" and "new" capacity. Accordingly, until any subsequent ruling to the contrary, the tariffs filed pursuant to the order in Case 27574 applied uniformly to all qualifying facilities.

13. On November 21, 1983, Niagara Mohawk made its compliance filing consisting in part of a new service classification of PSC No. 207 Electricity: SC-6—Purchase of Electric Energy and Capacity from Customers with Qualifying On-Site Generation Facilities. Exhibit "C" to Exhibit "1" annexed hereto. The SC-6 rate is set at the avoided cost level for Niagara Mohawk and is applicable to purchases by Niagara Mohawk of electric energy from qualifying facilities. Consistent with the Commission's order in Case 27574, Niagara Mohawk's SC-6 tariff makes no distinction between "old" and "new" capacity. It was, by its terms and absent a contrary ruling, the "applicable rate" referenced in the October 1, 1981 agreement.

14. By letter dated March 20, 1984, Allied requested that the rate for purchases by Niagara Mohawk be set pursuant to Niagara Mohawk's filed tariff, SC-6. Exhibit "D" to Exhibit "1" annexed hereto. Allied made such election under the express terms of its contract with Niagara Mohawk and chose SC-6 because it was then the only "applicable rate" and made no distinction between "old" and "new" qualifying facilities.

15. Following its refusal to honor Allied's election of the SC-6 rate, Niagara Mohawk filed a petition for a declaratory ruling with the Commission. Allied filed a counterpetition for a declaratory ruling and a complaint. Niagara Mohawk filed a response to the complaint. Copies of Niagara Mohawk's petition, Allied's counter-petition, Allied's complaint, and Niagara Mohawk's response are annexed hereto as Exhibits "E", "F", "G", "H" to Exhibit "1".

16. On January 22, 1985, the Commission issued a Notice and proposed Policy Statement in response to the petition and

counterpetition for declaratory rulings. Exhibit "I" to Exhibit "1" annexed hereto.

17. On February 14, 1986, the Commission issued its "Policy Statement Applicable to Qualifying Facilities That Provide Old Capacity." Exhibit "J" to Exhibit "1" annexed hereto. The policy statement requires that each utility file tariffs containing a rate applicable to purchase from "old" capacity facilities, subsequent to the issuance of the policy statement, initially equal to 50 percent of full avoided costs, increasing over a ten-year phase-in period to the full avoided costs level. The policy statement expressly states that this was the first time that the Commission had considered the distinction between rates for "old" and "new" capacity. See Exhibit "J" to Exhibit "1" annexed hereto, pp. 7-8.

(a) *Res Judicata*

18. This action seeks recovery of the difference between the contractual rate actually paid to Allied by Niagara Mohawk for the period March 20, 1984, when Allied elected the SC-6 rate, the only applicable rate, until February 14, 1986, when the Commission issued its final policy statement in which it ruled that Allied's facility is not prospectively entitled to Niagara Mohawk's SC-6 rate. The Commission claims that summary judgment should be granted because its January 22, 1985 order purportedly contained a final ruling that Allied was not entitled to the SC-6 rate and that such ruling is *res judicata*. Blabey Affidavit, p. 2.

19. To demonstrate *res judicata,* the Commission must show that the issue of whether the SC-6 rate was the "applicable rate" during the contested period has been finally resolved by either the January 22, 1985 or the February 14, 1986 Commission orders. The Commission has failed to make this showing. Neither order addresses the issue of the applicable rate during the period following Allied's election of the SC-6 rate until February 14, 1986 and cannot be considered a final and complete ruling on this issue.

20. The Commission has asserted that the relief sought by Allied was expressly considered by the Commission and denied in its January 22, 1985 Notice and *proposed* Policy Statement. Blabey Affidavit, ¶4. See also Exhibit "2", ¶14 annexed hereto. To the contrary, the language contained in the January 22, 1985 proposed Policy Statement only prospectively limited the rate to the "applicable rate" which would ultimately be established in the final policy statement:

> With respect to the Niagara Mohawk-Allied dispute and the option clause contained in their purchase power agreement, our 1981 Order required the inclusion of such provisions in long-term contracts with qualifying facilities that are entitled to full avoided cost tariff rates pursuant to FERC's rules and regulations implementing Section 210 of PURPA. Utilities were not required to include this provision in any other contracts or under any other circumstances. Without a specific determination by us that Allied, as a provider of old capacity, is entitled to full avoided costs, the S.C. No 6 tariff would not apply to the Niagara Mohawk-Allied contract. Nonetheless, with respect to Staff's proposed phase-in mechanism, Allied (and any other qualifying facility providing old capacity that entered into a similar agreement containing an option provision) would be allowed to begin to receive purchase rates pursuant to the staff proposal outlined above as soon as a tariff reflecting this mechanism is implemented by Niagara Mohawk.

Exhibit "1" to Exhibit "1" annexed hereto, p. 8. The Commission's contention that this order is a definitive ruling that Allied's facility was not retroactively entitled to SC-6 rates or that the ruling precluded the use of SC-6 as the applicable rate prior to the issuance of a final policy statement or even the issuance of the tentative ruling is unfounded. The Commission would have been authorized to rule that Allied was not entitled to SC-6 rates if it complied with federal regulations. 18 C.F.R. §292.304(b)(3), and held that the contract rate or some other rate provided the necessary incentives for "old" capacity facil-

ity. However, the Commission did not do so. Instead, it issued a mere proposal for comment on its prospective regulatory treatment of "old" capacity. Having failed to meet the prerequisites to drawing a distinction between "old" and "new" capacity, the January 22, 1985 ruling was not a final determination of the Allied-Niagara Mohawk dispute.

21. Any ruling purportedly made in the January 22, 1985 Commission order was not a discreet ruling on the Niagara Mohawk-Allied dispute. As an appropriate response to the January 22, 1985 order, Allied filed comments in opposition to the proposed policy statement on March 22, 1985. A copy of the comments is annexed hereto as Exhibit "3" and made a part hereof. Thus, any ruling regarding Allied and Niagara Mohawk tentatively included in the January 22, 1985 order was not final until the Commission approved the final policy statement on February 14, 1986. During both periods from March 20, 1984 to January 22, 1985 and from January 22, 1985 to February 14, 1986, the only "applicable rate" absent a contrary ruling by the Commission was SC-6 to which Allied had already properly elected.

22. The issuance of the final policy statement on February 14, 1986 was the first time that the Commission ruled that "old" capacity qualifying facilities such as Allied were eligible for an alternative rate ultimately reaching the full avoided cost SC-6 rate over a ten-year phase-in. Thus, this ruling was the first time that the Commission ruled that both the SC-6 rate was not prospectively available to Allied *and* established the alternative rate to which Allied is entitled pursuant to the election clause contained in its agreement with Niagara Mohawk.

23. The February 14, 1986 order also is not a final ruling in this dispute. Allied seeks damages for the period of time *prior* to the Commission's February 14, 1986 ruling. Although not agreeing with the Commisison's determination in the final Policy Statement, Allied concedes, for purposes of this lawsuit, that the ruling was within the authority of the Commission and accepts the finding that "old" capacity rates may be less than

full avoided costs for the period *after* February 14, 1986. However, as the basis of this action, Allied is entitled, pursuant to the exercise of its contractual right of election, to recover the difference between the rate it received from Niagara Mohawk and SC-6, the only applicable rate, during the contested period prior to February 14, 1986. Neither the January 22, 1985 order nor the February 14, 1986 final Policy Statement have pertained to this time period. *Res judicata* does not preclude the investigation of this issue here.

(b) *Statute of Limitations*

24. The Commission has further asserted that because Allied failed to seek judicial review of the January 22, 1985 notice and proposed policy statement and the February 14, 1986 final policy statement, it is barred from bringing this action by the Statute of Limitations governing Article 78 proceedings. Blabey Affidavit, ¶4. See also Exhibit "2" annexed hereto, pp. 3-4. This assertion is also incorrect.

25. The contractual issue presented here does not constitute judicial review of either the January 22, 1985 or the February 14, 1986 order. As discussed, *supra*, ¶¶ 20-21, the January 22, 1985 order did not resolve the issue of which rate was applicable during the contested period. The February 14, 1986 order only prospectively rules that the Allied facility is not, as "old" capacity, entitled to full avoided costs. Because any ruling regarding "old" capacity facilities could only be final if it provided a determination that some other rate less than full avoided costs was an appropriate applicable rate for old capacity, the January 22, 1985 Commission order was not a final order appropriate for judicial review in an Article 78 proceeding. Instead, the January 22, 1985 order merely stated the Commission's opinion tentatively in the form of a proposed policy statement which was subject to partial or total revision upon the review of comments submitted in response thereto. As the appropriate recourse to the January 22, 1985 order, Allied filed timely comments with the Commission on March 22, 1985. See Exhibit "3" annexed hereto. Allied is not now seeking review

of either the January 22, 1985 or the February 14, 1986 order and is asking this Court to act only in enforcing its contractual rights for the contested period prior to the February 14, 1986 order.

26. Because the primary issue presented in the amended complaint is purely contractual, it is properly before the Court as a contract issue rather than as an Article 78 review of the Commission's orders. The complaint involves one contract between Allied and Niagara Mohawk and does not require an interpretation of or in any way affect the prospective application of the February 14, 1986 policy statement. As such, the administrative actions of the Commission are not under review.

WHEREFORE, the motion of the defendant Public Service Commission of the State of New York for summary judgment should be denied.

James W. McTarnaghan

Sworn to before me this
12th day of September, 1986

Kathleen M. Haughney
Notary Public, State of New York
Qualified in Albany County
No. 6954
Commission Expires April 28, 1988

No. 88-602

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALLIED CHEMICAL, an operating unit of Allied Corporation,

Petitioner,

—v.—

NIAGARA MOHAWK POWER CORPORATION and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

NIAGARA MOHAWK POWER CORPORATION BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John S. Kinzey*
Leon A. Allen, Jr.
Bert H. Ware

LEBOEUF, LAMB, LEIBY & MACRAE
Of Counsel
Attorneys for Respondent
Niagara Mohawk Power Corporation
520 Madison Avenue
New York, New York 10022
(212) 715-8000

*Counsel of Record

December 1, 1988

QUESTION PRESENTED

Whether the unfounded allegation that this case presents a federal question implicating the Public Utility Regulatory Policies Act of 1978 ("PURPA") is sufficient to warrant a grant of certiorari where petitioner was held to be collaterally estopped under State law from attacking a State administrative agency ruling and where petitioner failed to raise its federal objection in the proper State forum below?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
A. The Enactment of PURPA and Regulations of the Federal Energy Regulatory Commission	2
B. The Commission's Implementation of PURPA Provisions	4
C. The Niagara Mohawk-Allied Power Purchase Contract	4
D. Niagara Mohawk's Avoided Cost Tariff and the Commission's Ruling	5
E. Allied's Failure to Appeal and Subsequent Collateral Attack	6
F. The Proceedings Before the Courts of the State of New York	7
REASONS WHY THE PETITION SHOULD BE DENIED	8
1. No Federal Question Has Been Presented In This Case	8
2. Allied Fails To Raise A Question Of Sufficient Importance To Warrant Review By This Court Because The Commission Acted In A Manner Entirely Consistent With PURPA	11

PAGE

CONCLUSION 14

APPENDICES

A. Agreement Between Allied Chemical And Niagara Mohawk Power Corporation Dated October 1, 1981..... A-1

B. Petition of Niagara Mohawk Power Corporation To The Public Service Commission Of The State Of New York For A Declaratory Ruling Filed On April 5, 1984. ..... B-1

C. Allied Chemical's Counterpetition To Niagara Mohawk's Petition For A Declaratory Ruling Filed On June 19, 1984..... C-1

TABLE OF AUTHORITIES

Cases	PAGE
Allied Chemical v. Niagara Mohawk Power Corp., 129 A.D.2d 233, 517 N.Y.S.2d 635 (4th Dep't), *appeal granted*, 70 N.Y.2d 611, 523 N.Y.S.2d 495 (1987) ...	8
Allied Chemical v. Niagara Mohawk Power Corp., 72 N.Y.2d 271, 532 N.Y.S.2d 230 (1988)	8, 9
American Paper Institute v. American Electric Power Service Corp., 461 U.S. 402 (1983).....	2, 12
American Surety Co. v. Baldwin, 287 U.S. 156 (1932)..	10
Beck v. Washington, 369 U.S. 541 (1962).....	10
Campo v. New York City Employees' Retirement System, 843 F.2d 96 (2d Cir.), *cert. denied*, 57 U.S.L.W. 3259 (1988)	10
Commonwealth of Pennsylvania v. Brown, 260 F. Supp. 323 (E.D. Pa. 1966), *aff'd*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968)	9
Consolidated Edison Co. of New York, Inc. v. Public Service Commission, 63 N.Y.2d 424, 483 N.Y.S.2d 153 (1984), *appeal dismissed*, 470 U.S. 1075 (1985)	10
Crowell v. Randell, 35 U.S. 368 (1836)	10
Equitable Life Assur. Society v. Brown, 187 U.S. 308 (1902)	9
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)	11
FERC v. Mississippi, 456 U.S. 742 (1982)	2
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	11

PAGE

Godchaux Co., Inc. v. Estopinal, 251 U.S. 179 (1919) . 10

Hines v. Davidowitz, 312 U.S. 52 (1941)..... 11

Howat v. Kansas, 258 U.S. 181 (1922) 11

Lombard v. Board of Education of the City of New York, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975)..... 10

Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4 (1939)..... 9

Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952) 9

Porter v. Nossen, 360 F. Supp. 527 (M.D. Pa. 1973), *aff'd*, 511 F.2d 1395 (3d Cir.), *cert. denied*, 423 U.S. 930 (1975) 9

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955)..... 9

Ross v. Moffitt, 417 U.S. 600 (1974)..... 8

Sugarman v. United States, 249 U.S. 182 (1919)..... 9

Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924)..... 9

Waybright v. Columbian Mut. Life Ins. Co., 122 F.2d 245 (6th Cir. 1941)..... 9

Yellow Cab Co. v. Price, 50 F. Supp. 730 (N.D. Ill. 1943) 9

Zucht v. King, 260 U.S. 174 (1922) 9

Administrative Decisions

Case 27824, *Proceeding Regarding Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, 21 N.Y.P.S.C. 66 (Order Implementing Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978, issued Jan. 7, 1981)..... 4

PAGE

Case 27574, *Consolidated Edison Co. of New York, Inc.*, 22 N.Y.P.S.C. 1858 (Opinion and Order Establishing Rates, Charges, Rules and Regulations for Electric Service Provided to Customers With On-Site Generation, Opinion No. 82-10 issued May 12, 1982) 5

Statutes

Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3144 ..... *passim*

16 U.S.C. § 796(18) 2

16 U.S.C. § 796(18)(A) 2

16 U.S.C. § 824a-3 ..... 2, 11

16 U.S.C. § 824a-3(a) 13

16 U.S.C. § 824a-3(d) 2

16 U.S.C. § 2601 *et seq.* 2

28 U.S.C. § 1257(3) 8

N.Y. Civ. Prac. L. & R. Art. 78 (McKinney 1981 and Supp. 1988) ..... *passim*

N.Y. Civ. Prac. L. & R. § 7801 10

Administrative Materials

18 C.F.R. Part 292 (1988) 2, 11

18 C.F.R. § 292.304 (1988) 2

18 C.F.R. § 292.304(b) (1988) 3

18 C.F.R. § 292.304(b)(1) (1988) 3

18 C.F.R. § 292.304 (b)(2) (1988) 12

18 C.F.R. § 292.304(b)(3) (1988) 3, 12, 13

PAGE

Court Rules

Sup. Ct. R. 15(1)(e) 9

Sup. Ct. R. 16(1)(b) 9

Sup. Ct. R. 17 8

Sup. Ct. R. 17(1)(a) 9

Other Authorities

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12214 (Feb. 25, 1980) 3, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALLIED CHEMICAL, an operating unit of Allied Corporation,

Petitioner,

—v.—

NIAGARA MOHAWK POWER CORPORATION and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

NIAGARA MOHAWK POWER CORPORATION BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Niagara Mohawk Power Corporation[1] ("Niagara Mohawk" or the "Company") respectfully requests that this Court deny the subject petition for writ of certiorari, seek-

---

1 As required by Rule 28.1 of this Court, the following information as to entities that may be considered, for the disclosure purposes of such rule, to be subsidiaries or affiliates of Niagara Mohawk Power Corporation is supplied: Opinac Investments, Ltd.; Opinac Energy, Ltd.; Canadian Niagara Power Company, Ltd.; Opinac Holdings, Ltd.; N.M. Uranium, Inc.; HYDRA-CO Enterprises, Inc.; Beebee Island Corporation; Moreau Manufacturing Corporation; NITECH, Inc.; and Curtis-Palmer Hydroelectric Company.

ing review of the order and opinion of the Court of Appeals of the State of New York.

STATEMENT OF THE CASE

Niagara Mohawk is a New York gas and electric corporation subject to the jurisdiction of the Public Service Commission of the State of New York (the "Commission").

Petitioner Allied Chemical ("Allied") owns and operates "qualifying" cogeneration facilities in conjunction with its manufacturing plants in the Town of Geddes, New York (the "Geddes Facility"). *See* Petition for Writ of Certiorari, p. 3; *see also* 16 U.S.C. § 796(18); *see generally* 16 U.S.C. §§ 2601 *et seq.*

A. The Enactment of PURPA and Regulations of the Federal Energy Regulatory Commission

Congress enacted PURPA on November 9, 1978, as one element of a comprehensive National Energy Act. Pub. L. 95-617, 92 Stat. 3144; *see FERC v. Mississippi*, 456 U.S. 742 (1982); *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402 (1983). In accord with the legislative mandate directing that it promulgate regulations encouraging the development of alternative energy sources,[2] the Federal Energy Regulatory Commission ("FERC") developed the regulatory scheme now codified at Title 18, Part 292 of the Code of Federal Regulations. *See* 18 C.F.R. Part 292 (1988). Those regulations required electric utilities, *inter alia*, to purchase electric energy from the owners of certain alternative energy sources—*e.g.*, "qualifying" cogeneration facilities—at rates based on "avoided costs"—*i.e.*, the costs to an electric utility of electric energy which, but for its purchase from a cogenerator, the electric utility would generate or purchase from another source. *See* 18 C.F.R. § 292.304; 16 U.S.C. § 824a-3(d); *see also* 16 U.S.C. § 796(18)(A).

---

2 *See* 16 U.S.C. § 824a-3(a).

The regulations further defined the term "qualifying facility" so as to distinguish "old capacity" constructed prior to the effective date of PURPA from "new capacity" cogeneration facilities for purposes of an electric utility's obligation to purchase cogenerated power. FERC permitted State regulatory authorities, like the Commission, to set rates for the purchase of electric energy generated by "old capacity" at a rate lower than the electric utility's full avoided costs "if the State regulatory authority . . . determines that the lower rate will provide sufficient encouragement of cogeneration. . . ." *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12214, 12223 (Feb. 25, 1980). FERC explained that

> [t]he limitation contained in the proposed rule was intended to prevent a cogenerator . . . which had found it economical to produce power for its own consumption prior to the issuance of these rules, from receiving the economic rent that might result from the purchase of its entire output at a utility's full avoided cost after that date without new investment on the part of the qualifying facility.

Id.

The regulations, therefore, permit the rate paid for the purchased electric energy to vary, depending upon the date upon which construction of the alternative energy source commenced. *See* 18 C.F.R. § 292.304(b). If the alternative energy source was constructed before November 9, 1978, it is characterized as an "old capacity" facility; if the source was constructed on or after that date, it is characterized as a "new capacity" facility. *See* 18 C.F.R. § 292.304(b)(1) and (3). The oldest unit at the Geddes Facility was constructed and placed in operation in 1942; the newest unit, in 1965. Accordingly, the Geddes Facility is properly characterized as an "old capacity" facility for which the Commission may, consistent with FERC regulations, establish a purchase rate at less than "avoided costs."

B. The Commission's Implementation of PURPA Provisions

On January 7, 1981, the Commission issued an order and rules implementing certain provisions of PURPA. Case 27824, *Proceeding Regarding Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, 21 N.Y.P.S.C. 66 (Order Implementing Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978, issued Jan. 7, 1981). The Commission's Order directed that, *inter alia*, electric utilities entering into purchase arrangements for electric energy generated by alternative sources include a contract provision which would allow either party to substitute an "applicable" rate for the "contract" rate (a "Substitution Clause"). The substituted "applicable" rate could be either that stated in a general tariff approved by the Commission or that ordered by the Commission on petition by either contracting party.

C. The Niagara Mohawk-Allied Power Purchase Contract

On or about October 1, 1981, Niagara Mohawk entered into a contract with Allied for the purchase of power generated at the Geddes Facility (the "Contract").[3] The contract rate to be paid Allied was fixed at the Company's average cost of fossil fuel per kilowatt hour of electrical production (the "Contract Rate"). In compliance with the Commission's directive, the Contract included the following Substitution Clause at Article FIFTH (attached hereto as Appendix A):

> It is further provided that either party may elect to replace the price for energy as specified above with an *applicable* rate specified by the New York State Public Service Commission either in a general tariff approved by the Commission or upon petition by either party to this AGREEMENT.

Appendix A-3 (emphasis added). On November 16, 1981, Allied and Niagara Mohawk filed the Contract with the Commission for its approval.

---

3 *See* Petition for Writ of Certiorari, p. 3.

D. Niagara Mohawk's Avoided Cost Tariff and the Commission's Ruling

On May 12, 1982, in Case 27574, *Consolidated Edison Co. of New York, Inc.*,[4] the Commission directed the State's electric utilities to file tariff leaves containing a purchase rate based upon full avoided costs.[5] At no point did the Commission indicate that the new tariff leaves were intended to replace existing contractual rates for "old capacity" facilities.

Niagara Mohawk filed its Service Classification Number 6 ("S.C. 6") tariff leaves with the Commission pursuant to the order in Case 27574 on January 31, 1984. On March 20, 1984, Allied presented Niagara Mohawk with a demand for the S.C. 6 tariff rate, claiming that the newly implemented S.C. 6 tariff rate was an "applicable" rate within the meaning of the Contract which could be substituted for the Contract Rate. Niagara Mohawk rejected Allied's demand, and, by petition dated April 5, 1984, requested that the Commission determine whether the S.C. 6 tariff leaves were an "applicable" rate which could be substituted for the Contract Rate. By counterpetition and complaint dated June 19, 1984, Allied also sought affirmative relief in the form of a resolution of the contractual dispute.[6] In the

---

4 Case 27574, *Consolidated Edison Co. of New York, Inc.*, 22 N.Y.P.S.C. 1858 (Opinion and Order Establishing Rates, Charges, Rules and Regulations for Electric Service Provided to Customers With On-Site Generation, Opinion No. 82-10, issued May 12, 1982).

5 *See id.* at 2003.

6 The petition and counterpetition before the Commission contain precise statements of the relief sought by both Niagara Mohawk *and* Allied. For example, in the "Petition of Niagara Mohawk Power Corporation to the Public Service Commission of the State of New York for a Declaratory Ruling" (attached hereto as Appendix B), the Company requested that the Commission issue:

> a declaratory ruling indicating whether Niagara Mohawk's current tariff SC-6 [the S.C. 6 Rate], incorporating payment at full-avoided cost, is the tariff envisioned for use in the Commission's order of

interim, Niagara Mohawk continued to pay Allied at the Contract Rate.

On January 22, 1985, the Commission issued its decision, finding that the S.C. 6 tariff leaves are not applicable to electric energy generated at the Geddes Facility. The Commission emphasized that the federal regulations distinguish "old" and "new" capacity facilities and determined that, as "old capacity," the Geddes Facility is not entitled to the Company's S.C. 6 tariff rate. *See generally* "Public Service Commission of the State of New York Ruling with Respect to the Niagara Mohawk-Allied Dispute and Proposed Policy Statement Applicable to Qualifying Facilities that Provide Old Capacity" (issued Jan. 22, 1985).[7]

E. Allied's Failure to Appeal and Subsequent Collateral Attack

The Commission's ruling with regard to the contractual dispute between Allied and Niagara Mohawk was final upon issuance. Neither party filed an application for rehearing or sought judicial review within the applicable four-month limitation

---

January 7, 1981 as payment for energy purchased from a facility, like Allied's, on which construction has begun prior to November 9, 1978. If it is not, under what criteria should the Company pay for such electricity purchased from Allied on a particular basis and, on a general basis, other similarly situated facilities?

Appendix B-6.

In Allied's "Counterpetition" (attached hereto as Appendix C), Allied requested "a declaratory ruling from the Commission requiring Niagara Mohawk to purchase power from Allied's cogeneration facility at the filed rate of SC 6 [the S.C. 6 Rate]. . . ." Appendix C-6.

7 In announcing its decision with regard to the respective rights of Allied and Niagara Mohawk, the Commission also instituted a generic proceeding, through means of a proposed policy statement, to determine whether qualifying facilities that provide "old capacity" would be entitled to rates approaching full avoided costs. The proposed policy statement provided for a prospective rate phase-in procedure applicable to all "old capacity" facilities. *See* Petitioner's Appendix F-1.

A final policy statement, applicable to the Geddes Facility, formally adopted a ten-year phase-in of full avoided costs for old capacity cogenerators. *See* Petitioner's Appendix G.

period specified by New York law. *See* N.Y. Civ. Prac. L. & R. Art. 78 (McKinney 1981 and Supp. 1988).

On January 27, 1986, Allied again presented Niagara Mohawk with a demand for payment at the S.C. 6 tariff rate covering the period between March 20, 1984—the date on which Allied advised the Company that it would exercise its option to be paid at the S.C. 6 Rate—and December 2, 1985. Following the Company's rejection of the second demand, Allied began a collateral attack on the Commission's decision by means of a breach of contract action in the courts of the State of New York.[8]

F. The Proceedings Before the Courts of the State of New York

The Supreme Court of the State of New York, Onondaga County, granted both Niagara Mohawk's motion to dismiss the Amended Complaint, and the Commission's motion for summary judgment, on the grounds that (1) the parties' dispute had been resolved in a quasi-judicial procedure by the Commission, and (2) Allied's challenge to the Commission's decision, cloaked in the guise of a breach of contract action, is time-barred by New York law. *See* Petitioner's Appendix E.

---

8 In lieu of an answer, the Company moved to dismiss the complaint on the grounds that, *inter alia*, the issue of tariff applicability had been litigated and finally decided by the Commission in its January 22, 1985 decision. In a bench ruling announced at the close of oral argument, the trial court ordered Allied to amend its complaint to name the Commission as a party defendant. In ordering the amendment, the court indicated that it wished to hear the Commission's views regarding the purpose and intent of the January 22 decision.

Allied served a Supplemental Summons and Amended Complaint on July 30, 1986, adding the Commission as a party defendant. The Amended Complaint sought no relief from the Commission. On August 18, 1986, the Commission answered, and moved for summary judgment on September 5, 1986. In its answer and pleadings, the Commission confirmed Niagara Mohawk's understanding of the January 22 decision, joining in the Company's argument that Allied's action is barred by the doctrine of *res judicata* and the applicable statute of limitations.

On appeal, the Supreme Court of the State of New York, Appellate Division, Fourth Department, unanimously affirmed the trial court's order dismissing the Amended Complaint, and held "that the manner in which the Allied Chemical-[Niagara Mohawk] dispute was resolved was adjudicatory in nature and that collateral estoppel should apply." *Allied Chemical v. Niagara Mohawk Power Corp.*, 129 A.D.2d 233, 235, 517 N.Y.S.2d 635, 637 (4th Dep't), *appeal granted*, 70 N.Y.2d 611, 523 N.Y.S.2d 495 (1987).

Finally, on appeal to the Court of Appeals of the State of New York, a unanimous panel affirmed the order below, holding that the doctrines of *res judicata* and collateral estoppel bar Allied's attempt to relitigate the lawfulness of the Commission's ruling. *See Allied Chemical v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 532 N.Y.S.2d 230 (1988).

REASONS WHY THE PETITION SHOULD BE DENIED

1. No Federal Question Has Been Presented In This Case.

Allied purports to invoke this Court's jurisdiction pursuant to the provisions of Title 28, Section 1257(3) of the United States Code. 28 U.S.C. § 1257(3);[9] *Ross v. Moffitt*, 417 U.S. 600, 617 (1974). The statute requires that to invoke the jurisdiction of this Court, a case must present a question of federal law. The Rules of this Court further suggest that the federal question raised must be substantial. Sup. Ct. R. 17. Mere reference to a federal statute in a State court decision otherwise entirely devoted to the resolution of a question of State law cannot per-

---

9 Section 1257(3) (28 U.S.C. § 1257(3)) provides in relevant part that:

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .:
>
> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn into question . . . or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

mit review. Here, no question of federal law exists and no federal statute is drawn into question.

Thus, petitioner fails to satisfy the jurisdictional requirements of this Court and the petition seeking the grant of a writ of certiorari to the Court of Appeals of the State of New York must be denied. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74 (1955); *see Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952); *Equitable Life Assur. Society v. Brown*, 187 U.S. 308 (1902); *Zucht v. King*, 260 U.S. 174, 176 (1922); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455 (1924); *Sugarman v. United States*, 249 U.S. 182, 184 (1919); Sup. Ct. R. 17(1)(a); *see also* Sup. Ct. R. 15(1)(e); Sup. Ct. R. 16(1)(b).

The unanimous decisions of three state courts, including the Court of Appeals, rest solely upon State law. The controlling issue is undeniably nonfederal in character, a question of New York procedural and administrative law—*i.e.*, whether the contractual dispute between Allied and Niagara Mohawk was fully, fairly and conclusively litigated by the parties, at their request, in a quasi-judicial proceeding before the Commission. *Allied Chemical v. Niagara Mohawk Power Corp.*, 72 N.Y.2d at 274, 532 N.Y.S.2d at 231. Any fair reading of the decision below establishes that the decision below explicitly and exclusively resolved the State law issue of whether Allied's breach of contract action is barred by the doctrines of *res judicata* and collateral estoppel.[10]

Moreover, Allied failed to raise, present, or pursue its federal claim in a timely and proper manner at the appropriate point in

---

10 It is well-settled that the question of applicability of the doctrine of *res judicata* to a State administrative agency determination is one of State law, not subject to review in this Court. *See Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 7-8, 11 (1939); *see Waybright v. Columbian Mut. Life Ins. Co.*, 122 F.2d 245, 247 (6th Cir. 1941); *Porter v. Nossen*, 360 F. Supp. 527, 529 (M.D. Pa. 1973), *aff'd*, 511 F.2d 1395 (3d Cir.), *cert. denied*, 423 U.S. 930 (1975); *Commonwealth of Pennsylvania v. Brown*, 260 F. Supp. 323, 340 (E.D. Pa. 1966), *aff'd*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968); *Yellow Cab Co. v. Price*, 50 F. Supp. 730, 733 (N.D. Ill. 1943).

the State forum. *See Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54 (1962); *see also Crowell v. Randell*, 35 U.S. 368, 391 (1836) ("If both of these [the raising and deciding of the federal question] do not appear on the record, the appellate jurisdiction fails"). If Allied believed the Commission to have acted beyond the scope of its jurisdiction its proper remedy was to bring an article 78 proceeding pursuant to Section 7801 of the New York Civil Procedure Law and Rules. *See* N.Y. Civ. Prac. L. & R. § 7801. Under New York law, article 78 "provides the mechanism for challenging a specific decision of a state administrative agency." *Campo v. New York City Employees' Retirement System*, 843 F.2d 96, 101 (2d Cir. 1988), *cert. denied*, 57 U.S.L.W. 3259 (1988), *appeal pending* (citations omitted); *Consolidated Edison Co. of New York, Inc. v. Public Service Commission*, 63 N.Y.2d 424, 483 N.Y.S.2d 153 (1984), *appeal dismissed*, 470 U.S. 1075 (1985); *see also Lombard v. Board of Education of the City of New York*, 502 F.2d 631, 636 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975) ("It seems clear enough that if the appellant actually failed to assert his constitutional claim in the state court, he could not get a writ of certiorari from the nonconstitutional judgment of the state court").[11]

Allied, however, having missed the four month statute of limitations governing article 78 actions, failed to follow the prescribed statutory scheme for seeking review of administrative decisions and instead brought a breach of contract action in which it argued that its action was not related to the Commis-

---

11 Assuming *arguendo*, that the Commission erred in some manner, the appropriate avenue for redress of Allied's grievance was, as the Court of Appeals of the State of New York found, an article 78 proceeding brought pursuant to the New York Civil Practice Law and Rules—a remedy Allied never sought. Through its failure to abide by the State's prescribed appellate procedures, Allied thereby waived its right to review in this Court. *See American Surety Co. v. Baldwin*, 287 U.S. 156, 169 n.6 (1932) (Court dismissed a writ of certiorari where petitioner had moved to vacate a state court judgment instead of appealing directly to the state supreme court saying: "The cases are many in which failure to comply with state rules of practice has prevented this Court from considering a federal claim on direct review") (citations omitted).

sion's decision and that the Commission should not be joined as a party to the action: "The issue presented by Allied in its Complaint is a purely contractual issue. . . . [T]he [Commission] has no recognizable interest in this proceeding which might be inequitably affected by a judgment in the action." *See* Petitioner's Appendix J-10.

An improper choice of remedy precludes review where the decision of the State administrative agency is attacked in collateral proceedings and not directly appealed. *Howat v. Kansas*, 258 U.S. 181 (1922). Allied collaterally attacked the Commission's decision in a breach of contract action instead of appealing it directly in a timely article 78 proceeding. Allied cannot now reverse field and attack the Commission's determination (and necessarily, its jurisdiction) directly. This Court should not sanction such inconsistency.

2. Allied Fails To Raise A Question Of Sufficient Importance To Warrant Review By This Court Because The Commission Acted In A Manner Entirely Consistent With PURPA.

Allied argues that the Commission somehow "redefined" PURPA and that the Commission's action was therefore preempted by the federal scheme. The Commission did nothing of the sort. Allied's effort necessarily must fail because the applicable provisions of PURPA and its implementing regulations establish beyond a shadow of a doubt that the Commission, in resolving Allied's contract-based dispute with Niagara Mohawk, acted squarely within its *expressly* delegated PURPA authority. *See* 16 U.S.C. § 824a-3; 18 C.F.R. Part 292 (1988). It is well settled that State action is only preempted by federal law to the extent that it actually conflicts with federal law. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 182 (1983). Conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Commission's ruling neither interferes with compliance with State and federal regulations

nor does it in any way constitute an obstacle to the accomplishment of the full purposes and objectives of PURPA.[12]

Allied concedes that the Geddes Facility was constructed prior to the enactment of PURPA. Under FERC's regulations, the Geddes Facility is, therefore a qualifying facility selling old capacity—*i.e.*, capacity "other than new capacity." The federal regulation explicitly governing rates for purchases from old capacity qualifying facilities is Section 292.304(b)(3) of the Code of Federal Regulations. 18 C.F.R. § 292.304(b)(3) (1988). That regulation specifically authorizes a state regulatory agency to establish rates for an electric utility's purchases of electric energy from the old capacity of a qualifying facility at "less than the avoided cost." Under the express terms of Section 292.304(b)(3), therefore, the Commission was authorized to set rates for the Geddes Facility at less than Niagara Mohawk's avoided costs.

It is only by ignoring Section 292.304(b)(3) that Allied can demand entitlement to the full avoided cost rates to which only *new capacity* facilities are automatically entitled under Section 292.304(b)(2).[13] Allied compounds the confusion engendered by its improper reliance upon Section 292.304(b)(2) when it argues that this Court's decision in *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402 (1983) supports the proposition that full avoided cost rates are mandatory for all qualifying facilities without distinction between old and new capacity facilities. *Id.* In fact, *American Paper Institute* merely upheld FERC's authority to set full avoided cost rates pursuant to subsection (b)(2) of Section 292.304 and made no reference whatever to subsection (b)(3). *See id.* at 406.

By unjustifiably asserting that it had an automatic entitlement to full avoided cost rates for its old capacity facility,

---

12 Allied's citation to decisions of this Court and state courts of last resort for the principle that PURPA preempts inconsistent state regulation is completely inapposite because the Commission's action was entirely consistent with PURPA.

13 That this claim is selective is clear in view of the explicit provision in 18 C.F.R. § 292.304(b)(2) that makes paragraph (b)(2) "[s]ubject to paragraph (b)(3) of this section."

Allied seeks in effect to remove from the Commission the discretion to differentiate between old and new capacity qualifying facilities in setting rates for purchases from such facilities.[14] Since such discretion is explicitly delegated to state regulatory commissions pursuant to Section 292.304(b)(3), it is Allied—not the Commission—which seeks to contravene the federal scheme.

Far from being "preempted" by PURPA, the Commission's 1985 determination was a proper implementation of the explicit provisions of FERC's regulations. There was no inconsistency with PURPA and no attempt to "redefine" anything. Indeed, the Commission quite properly rejected Allied's demand for a rate to which it was not entitled.

---

14 Pursuant to the implementing authority delegated to it under PURPA, FERC has decided that it is not essential to the accomplishment of PURPA's objectives to grant an automatic entitlement of full avoided cost rates to old capacity facilities. 16 U.S.C. § 824a-3(a). In fact, in promulgating 18 C.F.R. § 292.304(b)(3), FERC explicitly noted that a facility's existence prior to the enactment of PURPA "may indicate that appropriate economic returns were available without the further incentives provided by section 210." 45 Fed. Reg. at 12223. Thus, an old capacity facility cannot demand full avoided cost rates unless it demonstrates to the appropriate state regulatory authority "that it requires rates for purchases based on full avoided costs to remain viable, or to increase its output. . . ." *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

John S. Kinzey*
Leon A. Allen, Jr.
Bert H. Ware

LEBOEUF, LAMB, LEIBY & MACRAE
Of Counsel
Attorneys for Respondent
Niagara Mohawk Power Corporation
520 Madison Avenue
New York, New York 10022
(212) 715-8000

*Counsel of Record

December 1, 1988

APPENDICES

This AGREEMENT, made and entered into as of the 1st day of October, 1981, by and between ALLIED CHEMICAL, an OPERATING UNIT of ALLIED CORPORATION, a domestic corporation (hereinafter referred to as ALLIED), with offices at Solvay, New York, and NIAGARA MOHAWK POWER CORPORATION, a domestic corporation (hereinafter referred to as NIAGARA) with its office and principal place of business at Syracuse, New York.

W I T N E S S E T H :

WHEREAS, ALLIED owns and operates an electric generating station and co-generation facility located in the Town of Geddes, New York, for use in the operation of its manufacturing plant in the Town of Geddes, New York, and

WHEREAS, said manufacturing plant's electrical system is so arranged that electric energy generated therein can be delivered to the electric transmission system of NIAGARA with which it is physically connected, and

WHEREAS, ALLIED is, from time to time, able to generate electric energy in excess of its requirements, and

WHEREAS, NIAGARA, in the conduct of its business, can make use of the electric energy which ALLIED may generate at its electric generating plant in excess of its own requirements and other obligations and which ALLIED can deliver to NIAGARA.

NOW, THEREFORE, in consideration of the premises and covenants hereinafter set forth, the parties hereto have agreed and do hereby mutually agree as follows:

FIRST: ALLIED shall deliver to NIAGARA and NIAGARA shall accept all the electric energy produced at ALLIED's said electric generating plant in excess of its own requirements and other obligations subject to the qualifications of Paragraphs SECOND and THIRD.

SECOND: NIAGARA's acceptance and obligation to pay for electric energy produced will be limited to those times when NIAGARA's

system is physically able to accept such energy and, if necessary for system integrity or safety, NIAGARA may order that ALLIED's generation be disconnected from NIAGARA's system. NIAGARA's orders and directions pursuant thereto shall be transmitted to and executed by the employees of ALLIED in charge of the maintenance and/or operation of the electric generating plant without delay. Further, NIAGARA expressly reserves its right to the extent specified in any pertinent state/federal regulatory pricing provisions.

THIRD: ALLIED shall deliver the electric energy to the system of NIAGARA at approximately 34,500 volts, 60 Hertz, 3 Phase over the electrical connections presently existing between the electrical systems of the two companies; provided, however, that ALLIED shall in no event be required to operate said electric generating plant or to make deliveries of energy to NIAGARA therefrom in such manner as to interfere with the normal operation of its said manufacturing plant or

the conduct of its business.

FOURTH: ALLIED shall have the right to shut down the operation of its said electric generating plant whenever and for such periods of time as it may elect.

FIFTH: NIAGARA shall pay ALLIED at its office in Solvay, New York on or before the twenty-fifth (25) day of each month for the electric energy delivered to the electric system of NIAGARA during the preceding calendar month.

The price to be paid by NIAGARA for the electric energy received from ALLIED shall be determined on the basis of "time of day" deliveries. Every month, on a basis consistent with its normal fuel adjustment procedures, NIAGARA will determine the average cost of fuel per kilowatt hour produced at NIAGARA's fossil fuel steam generating stations by (a) oil and natural gas, and (b) coal during the prior month. These costs will then be the basis for payments for energy produced in the subsequent

month.

Each month, NIAGARA will pay its average oil and natural gas price as calculated by the above described method, for all energy delivered by ALLIED to NIAGARA's system between the hours of 8:00 AM and 10:00 PM, Mondays through Fridays, except for the following holidays when such holidays fall on other than a Saturday or a Sunday: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day. During all other hours, NIAGARA will pay its average coal price, as calculated by the above described method, for all energy delivered by ALLIED to NIAGARA's system.

It is further provided that either party may elect to replace the price for energy as specified above with an applicable rate specified by the New York State Public Service Commission either in a general tariff approved by the Commission or upon petition by either party to this AGREEMENT.

SIXTH: If the existing electrical

connections referenced in Paragraph THIRD become inadequate to deliver ALLIED's excess electrical energy to the system of NIAGARA, then ALLIED shall reimburse NIAGARA for the costs associated with any necessary reinforcement, ALLIED shall have the option of paying NIAGARA the total cost of the reinforcement, or in the event ALLIED elects to pay the annual costs, such costs shall be recomputed as of January 1 of each year. ALLIED shall provide all necessary rights-of-way to permit the construction, operation and maintenance for any reinforcement.

SEVENTH: This AGREEMENT is for a term of ten (10) years with the right of either party, with the consent of the other, to renew this AGREEMENT under the same conditions for an additional term of ten (10) years, subject to the further provisions of Paragraph Eighth.

EIGHTH: If, after July 1, 1983, ALLIED proposes to separate its electric generating facilities from its manufacturing plant and to sell these electric generating facilities at

any time thereafter during the term of this AGREEMENT or any renewal or extension thereof, ALLIED shall first notify NIAGARA of its intention in writing. Following receipt of such notice, NIAGARA shall have the first option to negotiate the purchase of ALLIED's electric generating facilities over a ninety (90) day period, upon the expiration of which, if the purchase by NIAGARA has not then been negotiated, ALLIED may sell the electric generating facilities to others. It is expressly understood that ALLIED is currently negotiating for the sale of these electric generating facilities to a third party and that such negotiations shall be exempted from the provisions of this article EIGHTH and that NIAGARA shall have no options with respect to these negotiations, provided that such negotiations are concluded by June 30, 1983. Should a sale of Allied's electric generating facilities to a third party be consummated, then this agreement shall be terminated on the date of such sale. Allied shall notify

Niagara 30 days prior to the closing of such sale.

NINTH: Any conveyance made pursuant to Paragraph EIGHTH above shall be sufficient if made by warranty deed with ingress and egress to the property conveyed.

TENTH: Electric energy delivered by ALLIED hereunder shall be measured by electric watthour meters of a type approved by the New York State Public Service Commission, which meters shall be installed, owned and maintained by NIAGARA; however, the cost of the meter and the installation cost will be borne by ALLIED. On any day or days which a meter shall not be in service or shall be deemed to be defective, the quantity of electric energy delivered shall be determined in such manner as the parties shall agree. Each party shall have the right at all reasonable times, upon giving not less than four (4) days notice to the other party, to inspect and test said meters, and if found defective, NIAGARA shall adjust, repair or

replace the same at ALLIED's expense.

ELEVENTH: The duly authorized agent or agents of NIAGARA, shall, at all reasonable hours, have free access to the metering facilities associated with the delivery of electric energy to NIAGARA for the purpose of inspecting the records of such deliveries and/or reading and maintaining the meters.

TWELFTH: During the term of this AGREEMENT, NIAGARA, at its expense, shall have the right, easement and privilege to construct, operate, repair, maintain, remove and/or replace such electric transmission lines as it may reasonably require over and across the premises of ALLIED for the purpose of receiving and transmitting the electric energy herein provided to be delivered to NIAGARA, subject to the reasonable approval of ALLIED. Such approval may be withheld by ALLIED if the steps to be taken by NIAGARA relative to the construction, operation, repair, maintenance, removal and/or replacement of such electric transmission

lines would, in ALLIED's sole judgment, interfere with the normal operation of its said manufacturing plant or the conduct of its business.

THIRTEENTH: In the event of failure by NIAGARA to pay any amounts due to ALLIED as provided in Paragraph FIFTH above within a period of thirty (30) days subsequent to the due date, ALLIED shall have the right to suspend the deliver of energy to NIAGARA upon no less than seven (7) days prior written notice to NIAGARA of its intention to do so. If NIAGARA thereafter makes payment to ALLIED of all amounts due within a period of sixty (60) days from the date of suspension, such suspension shall be removed.

Any suspension of delivery caused by NIAGARA's failure to pay for a period of less than ninety (90) days shall not abrogate or modify any other provision of this AGREEMENT nor be held or construed as releasing either party hereto from its liability hereunder.

FOURTEENTH: Each party hereto

respectively assumes full responsibility in connection with the electric service supplied hereunder on each side of the point of delivery and for the wires, apparatus, devices and appurtenances used in connection therewith. Each party shall indemnify, save harmless and defend the other against all claims, demands, costs or expense for loss, damage or injury to person or persons or property in any manner directly or indirectly arising from, connected with or growing out of the generation, transmission or use of energy by it on its side of the point of delivery or for the operation of switching equipment in connection with said delivery, provided, however, that each party shall be liable for all claims of the party's own employees arising out of any provision of the Workers' Compensation Law.

FIFTEENTH: This AGREEMENT and the payments to be made hereunder shall not be assigned or transferred by either party without the prior written consent thereto of

the other party, which shall not be unreasonably withheld. Any assignment without the requisite consent shall be void.

SIXTEENTH: This AGREEMENT and all of its terms and conditions shall bind and enure to the benefit of the administrators, successors, grantees and assigns of the respective parties hereto.

SEVENTEENTH: This AGREEMENT is exclusive and contains all of the terms of the agreement between the parties and no change or variation in this AGREEMENT may be made except in express terms and by an instrument in writing signed by the parties hereto.

EIGHTEENTH: Niagara enters into this agreement with the express condition that both parties understand that the New York State Public Service Commission ("the Commission") has ordered Niagara to submit this agreement to the Commission for its review and possible modification or abrogation within sixty days of submittal. Both parties agree to abide by any orders the Commission may give in this

connection, and neither party will be liable or responsible to the other for any damages, costs or expenses (or losses thereof) arising out of such Commission review, modification, abrogation or approval.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed effective as of the day and year first above written.

ALLIED CHEMICAL, AN OPERATING UNIT OF ALLIED CORPORATION

By: /s/
H. J. N. Lalonde

Title: Director of Purchasing

Date: October 30, 1981

NIAGARA MOHAWK POWER CORPORATION

By: /s/
G. D. Garcy

Title: Power Contract Director

Date: November 2, 1981

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the Petition of

NIAGARA MOHAWK POWER CORPORATION

for a declaratory ruling from the New York Public Service Commission pursuant to Sections 20 and 66 of the Public Service Law and Section 204 of the State Administrative Procedures Act;

for a determination as to whether avoided cost is the appropriate price to be paid to qualifying facilities as that term is utilized in the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. Section 2601 et seq.) and Section 66-c of the Public Service Law of the State of New York;

for such facilities for which construction has commenced prior to November 9, 1978 ("old capacity")

TO THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK:

NIAGARA MOHAWK POWER CORPORATION

("Niagara Mohawk") or (the "Company") hereby petitions the New York State Public Service Commission (the "Commission") pursuant to New York State Public Service Law Sections 20 and 66 and the State Administrative Procedure Act

Section 204 to issue a declaratory ruling from the Commission with respect to the interpretation of the Commission's Order 82-10 in Case 27574 - Consolidated Edison Company of New York, Inc. - Electric Service Provided to Customers With On-Site Generation and its Order in Case 27824 - Proceeding Regarding Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978 with particular reference to the obligation of Niagara Mohawk to make payment for electricity purchased from qualifying facilities, construction of which commenced prior to November 9, 1978 ("old capacity").

In support of this petition, Niagara Mohawk respectfully alleges as follows:

1. Niagara Mohawk is a gas and electric corporation duly organized and existing under the laws of the State of New York having its principal office and place of business at 300 Erie Boulevard West, Syracuse, New York 13202. Its Certificate of Incorporation and amendments thereto have

heretofore been filed with the Commission in Case 12733. All other amendments to the Certificate of Incorporation have been filed in other numbered proceedings.

2. On November 9, 1978, the Public Utility Regulatory Policies Act (PURPA) 92 Stat. 3117, became effective which act provided, among other matters, that electric utility companies be obligated to purchase electricity from "qualifying facilities" as that term is defined in the statute and regulations adopted pursuant to the act by the United States Federal Energy Regulatory Commission (FERC).

3. On or about February 25, 1980, FERC published final regulations under Sections 201 and 210 of PURPA covering arrangements between electric utilities and qualifying facilities.[1]

---

[1] Qualifying facilities is defined to mean a cogeneration facility or a small power production facility which meets the qualifying requirements under Sub-part B of the FERC regulations.

In pertinent part, electric utilities are required to purchase electricity generated by qualifying facilities. Section 292.304(b)(3) provides as follows:

> "A rate for purchase (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section, and is sufficient to encourage cogeneration and small power production."

4. The Commission, by an Order issued January 7, 1981 in Case 27824, required Niagara Mohawk as well as the other electric utilities under its jurisdiction, in pertinent part, as follows:

> "3. Any contract for the sale of energy or capacity to an electric utility by a qualifying small power production facility or a qualifying co-generation facility shall include a provision permitting the qualifying small power production facility or qualifying co-generation facility to elect to change the price for energy or capacity to the rate specified in applicable tariffs or rules when approved or adopted by the Commission."

5. On May 5, 1982 in Order 82-10 in

Case 27574, the Commission ordered Niagara Mohawk as well as the other electric utilities subject to its jurisdiction to pay avoided costs (Pg. 26) for the purchase of electricity from qualifying facilities. Specifically, the Commission ordered as follows:

> "4. Except as specified in Paragraph 3, each electric utility shall, within sixty days of the issuance of this Opinion and Order, submit proposed rates, charges, rules and regulations for the purchase of electric energy and capacity from customers with qualifying on-site generation facilities that are consistent with this Opinion and Order***."

6. On or about October 1, 1981, Niagara Mohawk entered into an agreement with Allied Chemical, an Operating Unit of Allied Corporation ("Allied") to purchase electricity from a cogeneration facility owned by Allied in the Town of Geddes, New York. A copy of said agreement was filed with the Commission on November 16, 1981. This agreement calls for payment by Niagara Mohawk to Allied under a pricing formula as follows:

"This price to be paid by NIAGARA

for the electric energy received from ALLIED shall be determined on the basis of "time of day" deliveries. Every month, on a basis consistent with its normal fuel adjustment procedures, NIAGARA will determine the average cost of fuel per kilowatt hour produced at NIAGARA's fossil fuel steam generating stations by (a) oil and natural gas, and (b) coal during the prior month. These costs will then be the basis for payments for energy produced in the subsequent month.

Each month, NIAGARA will pay its average oil and natural gas price as calculated by the above described method, for all energy delivered by ALLIED to NIAGARA's system between the hors of 8:00 AM and 10:00 PM, Mondays through Fridays, except for the following holidays when such holidays fall on other than a Saturday or a Sunday: New Year's Day, Memorial Day,

Independence Day, Labor Day, Thanksgiving Day and Christmas Day. During all other hours, NIAGARA will pay its average coal price, as calculated by the above described method, for all energy delivered by ALLIED to NIAGARA's system."

This formula has resulted in recent payment to Allied at the following rates:

	(On Peak cents per KWH)	(Off Peak cents per KWH)
February 1984	4.9616	2.0114
January 1984	4.9920	1.8954
December 1983	5.0659	1.9162
November 1983	5.0550	2.0119
October 1983	4.7022	2.0177
September 1983	4.7325	2.0854

In conformance with the Commission's Order of January 7, 1982 (Statement 4 above) the agreement with Allied also states ...

"It is further provided that either party may elect to replace the price for energy as specified above

with an applicable rate specified by the New York State Public Service Commission either in a general tariff approved by the Commission or upon petition by either party to this AGREEMENT". (paragraph FIFTH, page 3).

7. Also, during the negotiation of the energy purchase agreement, Allied requested back-up service in the event of generator failure. This service was arranged under Niagara Mohawk's Service Classification 2 with a minimum Contract Demand of 1500 kilowatts.

8. By letter dated March 20, 1984 to Mr. G.D. Garcy from Mr. Jon M. Tyner, attached as Exhibit A, Allied has requested that it be placed under SC-6 and SC-7. Necessary meter readings were taken on March 26, 1984 to respond to Allied's request. However, if this were done, the differential between existing contractual provisions and payments under SC-6 and SC-7, using 1983 billing parameters, would be:

	Payment to Allied	Payment to Niagara
SC-6 and SC-7	$2,038,705.65	$ 3,366.84
Present Contract	1,263,498.34	103,036.46
Difference	$ 775,207.31	$-(99,669.62)

Purchase Power	$775,207.31
Backup Service	99,669.62
Difference in favor of Allied	$874,876.93

9. As also indicated in a letter dated March 19, 1984, attached as Exhibit B from Allied's Mr. Jon Tyner, Allied is deemed to be a qualifying facility meeting the criteria set forth in 18 CFR Section 292.203. Niagara Mohawk has been purchasing electricity from Allied production at this facility since inception of the contract.

10. Upon information and belief, said Allied facility contains several units which produce steam and electricity. The oldest operating unit contains a boiler which was completed in 1942 and the newest unit contains a boiler which was completed in 1965.

11. Niagara Mohawk currently has in

effect 18 long term agreements with owners of "qualifying facilities" containing "old capacity". Of these, 9 have an option to elect payment at the tariff rate, pursuant to the Commission's Order. Exercise of these options by these other qualifying facilities would significantly increase the payments Niagara Mohawk would have to make under these contracts.

12. Niagara Mohawk hereby petitions the Commission for a declaratory ruling indicating whether Niagara Mohawk's current tariff SC-6, incorporating payment at full-avoided cost, is the tariff envisioned for use in the Commission's order of January 7, 1981 as payment for energy purchased from a facility, like Allied's, on which construction has begun prior to November 9, 1978. If it is not, under what criteria should the Company pay for such electricity purchased from Allied on a particular basis and, on a general basis, other similarly situated facilities?

13. Niagara Mohawk believes that a

sufficient payment to "qualifying facilities" with "old capacity" would equate to payment for "avoided energy costs" only rather than full avoided costs. Further, Niagara Mohawk believes that such payment for "avoided energy" should be in accordance with the formula currently used for payment to Allied. (see paragraph 6 above).

For all the foregoing reasons, Niagara Mohawk requests a declaratory ruling from the Commission providing specific direction whether the Company must pay Allied a price or rate based upon Niagara Mohawk's avoided costs as provided in its SC-6 or at some lesser price or rate determined by the Commission as provided in 18 CFR Section 292.304(b)(3). Niagara Mohawk also requests that the Commission issue a declaratory ruling as to what general criteria Niagara Mohawk should apply, if any, to persons who own qualifying facilities the construction of which commenced prior to November 9, 1978 in determining what price or rate should be paid for electricity

sold to Niagara Mohawk from such facilities or whether such matters should be handled on a case-by-case basis pursuant to Case 17824. Third, should the back-up service to Allied be provided as is currently done under SC-2 or whether such service should now be provided under SC-7.

NIAGARA MOHAWK POWER CORPORATION

By: /s/
Thomas J. O'Neill
System Attorney

STATE OF NEW YORK)
) ss.:
COUNTY OF ONONDAGA)

THOMAS J. O'NEILL, being duly sworn, deposes and says that he is System Attorney of NIAGARA MOHAWK POWER CORPORATION, the corporation on whose behalf he executed the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge or upon information and belief and as to those matters he believes it to be true.

/s/
Thomas J. O'Neill
System Attorney

Sworn to before me this
5th day of April, 1984.

/s/
Deborah Jean Polichemi
Notary Public

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the Petition of

NIAGARA MOHAWK POWER CORPORATION

for a declaratory ruling from the New York State Service Commission pursuant to Sections 20 and 66 of the Public Service Law and Section 204 of the State Administrative Procedures Act; for a determination as to whether avoided cost is the appropriate price to be paid to qualifying facilities as that term is utilized in the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §2601 et seq. and Section 66-c of the Public Service Law of the State of New York;

for such facilities for which construction has commenced prior to November 9, 1978 ("old capacity")

Case No. 27824

TO: THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK:

Allied Chemical (Allied), an operating unit of Allied Corporation, hereby files its counterpetition to Niagara Mohawk Power Corporation's (Niagara Mohawk) petition for a declaratory ruling on Niagara Mohawk's

obligation to make payment to Allied under Service Classification 6 of PSC No. 207 Electricity for electricity purchased from qualifying facilities, construction of which commenced prior to November 9, 1978 ("old capacity") and sell back-up service to Allied under Service Classification 7 of PSC No. 207 Electricity. Allied hereby requests that the New York State Public Service Commission (Commission) issue a declaratory ruling reaffirming its policy that all qualifying facilities in New York State are entitled to payment of full avoided costs.

In support of this counterpetition, Allied respectfully alleges as follows:

1. Allied owns and operates an electric generating station and cogeneration facility, located in the Town of Geddes, New York.

2. Allied and Niagara Mohawk originally entered into a contract for the purchase by Niagara Mohawk of excess power produced at Allied's cogeneration facility on

October 1, 1981. A copy of the contract is annexed hereto and made a part hereof as Exhibit "A". The contract provides that either party may elect to replace the contract price by a filed tariff rate. An additional contract was signed on November 1, 1981 for back-up service to Allied.

3. On March 20, 1984, Allied requested that the rate for purchases by Niagara Mohawk and the rate for back-up service by set pursuant to Niagara Mohawk's filed tariff No. 207, Service Classifications 6 and 7. Allied made such election under the express terms of the contract.

4. Niagara Mohawk rejected Allied's request by a letter to Allied dated April 18, 1984 and the petition to the Commission dated April 5, 1984 to which Allied now responds.

5. The October 1, 1981 agreement between Niagara Mohawk and Allied states:

> It is further provided that either party may elect to replace the price for energy as specified above with an applicable rate specified by the New York State Public Service Commission

> either in a general tariff approved by the Commission or upon petition by either party to this AGREEMENT. (Exhibit "A", p. 3)

6. This clause, which clearly gives Allied the right of election which it has exercised, was included in the contract in accordance with the terms of the January 7, 1981 Commission Order issued in Case 27824. The order required Niagara Mohawk to include an election provision in any contract for cogenerated power. The Order expressly noted the uncertainty to which suppliers were exposed by entering into long-term contracts in advance of the establishment of buy-back rates. The order states:

> Because we are implementing the Section 210 regulations on a utility-by-utility basis there will be some time before a determination regarding a buy-back rate is made for every utility in the state. In the interim, a qualifying facility may wish to sell electricity to utilities but may be reluctant to enter into a long-term contract if the utility is offering a price the qualifying facility believes is below the level we shall ultimately set. To advance the purposes of Section 210, accordingly, we shall require that contracts entered into after today for the sale of energy or

> capacity by a qualifying facility to a utility allow the qualifying facility the option, which may be exercised after we have set a buy-back rate for the utility pursuant to Section 292.304 of the FERC's rules, to change the contract price to that buy-back rate.* [footnote omitted] (Order, p.6)

7. A refusal to pay full avoided cost to all cogenerators would have a chilling effect on the amount of cogeneration capacity which is made available. Allied expended over a million dollars to connect its capacity to the Niagara Mohawk system and expects to made additional capital investments and to incur additional expense in connection with these facilities. Such capital expenditures and expenses are most fairly recovered through the payment of full avoided costs to Allied.

8. The filed tariff SC6, by its own terms, is the "applicable rate". The sole criterion in the tariff is that the customer operate a qualifying facility. Niagara Mohawk concedes in its Petition that Allied owns a qualifying facility (Petition, ¶ 11, 13).

9. Niagara Mohawk is required to pay

the full avoided cost for old capacity under the Public Utility Regulatory Policies Act, 16 U.S.C. 824 et seq. (PURPA), and the implementation of PURPA in New York State. PURPA directed the Federal Energy Regulatory Commission (FERC) to promulgate regulations establishing the price for the cogenerated power encouraged by that statute. FERC established that cogenerated power should receive a rate which is just and reasonable, 18 C.F.R., Part 292. This standard is deemed to require that new capacity be purchased at the full avoided cost of the utility. 18 C.F.R. 292.304(b)(2). Although the FERC regulations do not definitely set the rates for old capacity, Section 292.304(b)(3) requires

> A rate for purchases (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section [just and reasonable], and is sufficient to encourage cogeneration and small power production.

The Commission has not set the rate to be paid to "other than new capacity" at less than avoided cost, and, thus, there is no legal basis for the position which Niagara Mohawk has taken in this matter.

10. In Opinion 82-10, Consolidated Edison Company of New York, Inc., Case 27574, the Commission adopted the full avoided cost standard "as the basis for the rates paid to on-site generators authorized by Federal law to sell power to utilities." The Commission held that this standard best comports with its ratemaking policies. The Commission did not set the rate to be paid to "other than new capacity" at less than avoided cost in Case 27574, nor at any later time. Opinion 82-10 supports Allied's position that it is eligible for service pursuant to the full avoided cost tariff.

11. New York State's energy policy clearly encourages cogeneration. New York State's Draft Energy Master Plan seeks to promote and encourage the economic development

of renewable and indigenous energy resources (among which the New York State Energy Office includes cogeneration) as a cost effective way to diversify the State's energy supplies. Vol. 1, New York State Energy Master Plan and Long Range Electric and Gas Report 15 (Draft Report, August 1983). It would be anomalous for the New York State Public Service Commission to sanction a pricing policy which discourages cogeneration and is inconsistent with New York State policy of decentralizing the sources of electric capacity.

12. The price differentials set forth in paragraph 8 of Niagara Mohawk's petition vividly show the extent to which Allied is harmed if the contract rate, and not the filed tariff rate, continues to be used.

WHEREFORE, for the foregoing reasons, Allied requests a declaratory ruling from the Commission requiring Niagara Mohawk to purchase power from Allied's cogeneration facility at the filed rate of SC 6, PSC 207 Electricity and sell back-up service to Allied under SC-7.

ALLIED CORPORATION
By:

/s/

Algird F. White, Jr.
LAW OFFICES OF
ALGIRD F. WHITE, JR.
One Steuben Place
Box 314
Albany, New York 12201
Tel. (518) 434-1161

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

ALGIRD F. WHITE, JR., being duly sworn, deposes and says that he is the attorney for Allied Corporation, that he has read the foregoing counterpetition and knows the content thereof, and that the same is true of his own knowledge or upon information and belief and as to those matters he believes it to be true.

/s/
Algird F. White, Jr.

Sworn to before me this
19th day of June, 1984.

/s/
Ruth Anne McGlew
Notary Public

FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-602 (3)

IN THE

Supreme Court of the United States

October Term, 1988

ALLIED CHEMICAL, an operating unit of Allied Corporation,

Petitioner,

vs.

NIAGARA MOHAWK POWER CORPORATION and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

NEW YORK STATE PUBLIC SERVICE COMMISSION BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM J. COWAN
General Counsel to the
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223
(518) 474-1286

LAWRENCE G. MALONE*
of Counsel

Dated: Albany, New York
December 1, 1988

* *Counsel of Record*

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

18 pp

Question Presented

Does a litigant who is barred as a matter of State law from collaterally attacking the merits of a state agency ruling raise a reviewable federal question by alleging, without basis, that the agency ruling misinterpreted a federal statute?

The answer is no.

TABLE OF CONTENTS.

	Page
Question Presented	i
Table of Contents	ii
Index of Authorities	iii
Statement of Facts	3
The Enactment of PURPA	3
Allied's Contract with Niagara Mohawk	4
Niagara Mohawk's Avoided Cost Tariff and the PSC's Ruling	4
Allied's Inaction, Followed By Its Time-Barred Collateral Attack	5
The State Courts' Interpretation of State Law	5
Summary of Argument	7
Point I. Inasmuch as the New York Court of Appeals' decision turned solely on State law, Allied's petition for review does not raise a federal question	8
Point II. In any event, the Commission's decision is absolutely consistent with PURPA	9
Point III. There is no conflict between the New York Court of Appeals' holding and decisions of other jurisdictions	10
Conclusion	13

Page

INDEX OF AUTHORITIES.

CASES:

American Paper Institute, Inc. v. American Electric Power Service Corp., 461 U.S. 402 (1983) 3,10
Bates Fabric, Inc. v. Public Utilities Commission, 447 A2d 1211 (1982) 10
FERC v. Mississippi, 456 U.S. 742, 745, reh'g denied, 458 U.S. 1131 (1982)..... 3
Kansas City Power and Light Company v. State Corporation Commission, 676 P.2d 764 (1984), app. dism. 479 U.S. 801 (1986)..... 11
Matter of Consolidated Edison Company v. Public Service Commission, 63 N.Y. 424 (1984), app. dism. 470 U.S. 1075 (1985)..... 11,12
Moran, Superintendent, Rhode Island Department of Corrections v. Burbine, 475 U.S. 412 (1986)..... 6
Mullaney, et al. v. Wilbur, 421 U.S. 684 (1975)..... 8
Oklahoma Packing Co. v. Oklahoma Gas and Electric Co., 309 U.S. 4, 7-8, 11 (1939) 8

Page

STATUTES & REGULATIONS:

16 U.S.C. Section 767(17)(a) (Supp. V) 3
16 U.S.C. Section 796(18)(a) (Supp. V) 3
16 U.S.C. §824a-3(a) 3
16 U.S.C. §824a-3(d) 3
16 U.S.C. §824(f)(1) 8
28 U.S.C. Section 1257(3) 8
18 C.F.R. Section 292.304(b)(2) 9
18 C.F.R. Section 292.304(b)(3) 9
45 Fed. Reg. 12214 3
45 Fed. Reg. 12215-12216 3
45 Fed. Reg. 12223 3,7,10
45 Fed. Reg. 12231 8
PURPA Section 201 3
PURPA Section 210(a) 3
Public Service Law Section 66-c 11,12
Public Utility Regulatory Policies Act of 1978 (Pub. L. 95-617, Stat. 3144) 3

IN THE

Supreme Court of the United States

No. 88-602

October Term, 1988

ALLIED CHEMICAL, an operating unit of Allied Corporation,

Petitioner,

vs.

NIAGARA MOHAWK POWER CORPORATION and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

NEW YORK STATE PUBLIC SERVICE COMMISSION BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Allied Chemical (Allied) has petitioned for a writ of certiorari to review a unanimous New York State Court of Appeals' decision that precluded Allied from collaterally attacking a 1985 New York Public Service Commission decision. The thrust of Allied's petition is a contention that the Commission's 1985 ruling should not have been given *res judicata* effect in Allied's breach of

contract action against Niagara Mohawk Power Corporation (Niagara Mohawk) because the ruling allegedly involved an erroneous interpretation of federal law.

This brief demonstrates that certiorari is not warranted because 1) Allied's quarrel with the New York State Court of Appeals' *res judicata* holding turns solely on state law; 2) Allied's PURPA argument is, in any event, specious; and 3) there is no conflict on this matter between Federal Circuits or states.

Statement of Facts

The Enactment of PURPA

Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA) as part of a comprehensive response to a nation-wide energy crisis (Pub. L. 95-617, Stat. 3144). See, *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983); *FERC v. Mississippi*, 456 U.S. 742, 745, reh'g denied, 458 U.S. 1131 (1982). Among other things, PURPA directed FERC to promulgate rules requiring electric utilities to offer to purchase energy from qualifying small power production and cogeneration facilities (16 U.S.C. Section 824a-3(a)).[1]

In 1980, FERC implemented PURPA by promulgating regulations, which provided, *inter alia*, that owners of facilities constructed after the enactment of PURPA would be able to charge rates based on the costs utilities avoided by not having to generate the power which they purchased from them. *See*, PURPA §210(a); 16 U.S.C. 824 a-3(d). However, FERC made it absolutely clear that owners of qualifying facilities constructed before that date were *not entitled* to "avoided cost" rates (45 Fed. Reg. 12214, 12223).[2]

---

[1] PURPA Section 201 defines "small power production" facilities as those that produce electric power from biomass, waste or renewable resources (such as water, solar energy or wind) and that have a production capacity of not more than 80 megawatts. 16 U.S.C. §767(17)(a) (Supp. V). It defines a "cogeneration facility" as a facility that produces both electric energy and steam or some other form of useful energy (such as heat). 16 U.S.C. §796(18)(a) (Supp. V).

[2] FERC also indicated that state regulatory agencies, in implementing its regulations, *could*, as a matter of discretion, allow "old" (pre-PURPA) capacity rates based on avoided costs (45 Fed. Reg. 12215-12216, 12223).

Allied's Contract with Niagara Mohawk

In 1981, Allied and Niagara Mohawk agreed that Allied would sell Niagara Mohawk power generated at its Geddes facility. The parties recognized that because Geddes was constructed well before the enactment of PURPA, its power would be sold for a price equal to Niagara Mohawk's *average fossil* fuel cost per kilowatt hour. Alternatively, the contract specified that Niagara Mohawk could be required to pay an "applicable rate specified by the New York State Public Service Commission either in a general tariff approved by the Commission or upon petition by either party."

Niagara Mohawk's Avoided Cost Tariff and the PSC's Ruling

Two years later, Niagara Mohawk filed an avoided cost (SC-6) tariff with the Public Service Commission to establish the rate that owners of "new capacity" could charge. Although its Geddes facility was "old capacity," Allied presented Niagara Mohawk with a demand for SC-6 tariff rates.

Niagara Mohawk rejected Allied's demand and both parties petitioned the Commission for a declaratory ruling resolving the dispute. After reviewing the arguments, the Commission, referencing FERC's regulations distinguishing "old" from "new" capacity, concluded that because the Geddes facility was "old capacity", Allied was not entitled to Niagara's avoided cost (SC-6) tariff rates.[3]

---

[3] Allied complains that the Commission's declaratory judgment was issued "without any hearing" (Allied, 6), but Allied never requested a hearing (See, Petition, App. C-4). Moreover, inasmuch as the petition simply raised an interpretation of FERC regulations, no hearing was required.

The Commission also instituted a generic proceeding to determine on a prospective basis whether old capacity would be entitled eventually to rates approaching full avoided costs.[4] On February 14, 1986, it established a phase-in procedure that would gradually increase rates for old capacity to avoided costs (Petition, Appendix G).

Allied's Inaction, Followed By Its Time-Barred Collateral Attack

Although the Commission's 1985 declaratory ruling arguably involved a reading of PURPA, Allied did not seek review in either state or federal court. Indeed, it accepted Niagara Mohawk's "contract rates" until 1986, at which time it brought a breach of contract action in civil court for the right to charge SC-6 rates from March 20, 1984 (when it demanded full avoided cost rates) to February 14, 1986 (when the phase-in procedure took hold).[5] The PSC intervened as a necessary party.

The State Courts' Interpretation of State Law

After reviewing Allied's arguments, three New York State courts concluded unanimously that the Commission's 1985 ruling precluded relitigation of

---

[4] While the petitioner alleges that the Commission's 1985 ruling redefined PURPA's meaning of "qualifying facility" (Allied, 11, 14-16), the Commission's declaratory ruling demonstrates otherwise. Indeed, the Commission recognized that qualifying facilities could include old, as well as new, capacity, but it noted that FERC had expressly interpreted PURPA as not entitling "old" capacity to rates based on a utility's full avoided costs (Petition, Appendix F-7).

[5] Specifically, Allied argued that the utility had breached the 1981 agreement by failing to pay SC-6 tariff rates, and, therefore, was liable for the difference between the SC-6 avoided cost tariff rate and what it had actually paid under the contract.

Allied's alleged entitlement to full avoided cost rates. They, therefore, awarded summary judgment to Niagara Mohawk (Pet. App. A, C).[6]

Allied has now filed a petition for certiorari, claiming that the Commission's decision should not have been afforded *res judicata* effect because it was violative of PURPA and beyond the Commission's jurisdiction (Allied, 10, 11, 15, 22). Its position is fallacious.

[6] Allied's contention that Niagara Mohawk's failure to pay SC-6 tariff rates for Geddes' power was an "unquestionable breach" of the 1981 contract (Allied, 3) is astonishing, given the New York State courts' resolution of this controversy (Petition, App. A, C).

Summary of Argument

The Commission's 1985 ruling held that Allied's Geddes facility was not entitled to SC-6 rates (Petition, App. F-7). Allied did not seek judicial review, and New York State's highest court subsequently held Allied precluded by *res judicata* from relitigating the lawfulness of the Commission's ruling (Petition, App. A-7).

The United States Supreme Court has repeatedly found that it will not review a state court's interpretation of state law. Inasmuch as the New York Court of Appeals' *res judicata* holding was an interpretation of state law, Allied's petition for certiorari should be rejected.

In any event, Allied is simply wrong when it alleges that the Commission's ruling redefines PURPA's definition of qualifying facilities. The FERC regulations implementing PURPA state unequivocally that, unlike "new" capacity, "old" capacity, such as Allied's Geddes facility, is not entitled to rates based on avoided costs. 45 Fed. Reg. 12223.

Finally, Allied's claim that the Court of Appeals' holding implicitly conflicts with decisions of this and other Courts is baseless.

POINT I

Inasmuch as the New York Court of Appeals' decision turned solely on State law, Allied's petition for review does not raise a federal question.

Section 1257(3) of Title 28, the provision on which Allied grounds its petition for certiorari, requires that a party seeking review in this Court demonstrate a legitimate question of federal law. 28 U.S.C. §1257(3). Whether a ruling by a state agency should be given *res judicata* effect is a question of state law. *Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.*, 309 U.S. 4, 7-8, 11 (1939). Thus, Allied's petition for certiorari offers no basis for reviewing the New York Court of Appeals' decision.[7]

Although collateral attacks on agency decisions have been allowed for the purpose of contesting subject matter jurisdiction, there can be no claim in this case that the Commission lacked jurisdiction to resolve Allied's dispute with Niagara Mohawk because Allied *asked* the PSC to issue a declaratory ruling on its claim for SC-6 tariff rates. Moreover, FERC has stated many times that state regulatory agencies have jurisdiction to set purchase power rates by means "reasonably designed to give effect to the [FERC's] rules." 45 Fed. Reg. 12231; 16 U.S.C. §824(f)(1).

If the doctrine of *res judicata* is to have meaning, a party cannot be permitted to sit on its rights under state law to review an agency decision and then obtain federal review by simply contending that the agency ruling involved a federal statute. Allied's petition should be denied.

---

[7] While the Court will reexamine a State court's interpretation of state law when it appears to be an "obvious subterfuge to evade consideration of a federal issue" (*Mullaney, et al. v. Wilbur*, 421 U.S. 684 (1975)), there can be no serious contention in this case that the Court of Appeals attempted to evade a federal question. Indeed, New York's courts stood ready to review the Commission's 1985 ruling, but Allied failed to seek review within the requisite statute of limitations.

POINT II

In any event, the Commission's decision is absolutely consistent with PURPA.

Allied argues that the Court should grant its petition for certiorari because the Commission's 1985 ruling allegedly redefined PURPA's definition of qualifying facility by distinguishing "old" from "new" capacity (Allied, 11, 15, 24). FERC's regulations, however, emphasize the distinction between "old" and "new" capacity and expressly authorize state agencies to decide whether alternative power producers should be allowed to charge avoided cost rates for power generated by "old" capacity. 18 C.F.R. Section 292.304(b)(3).[8] In FERC's own words:

> For facilities, construction of which commenced before the enactment of PURPA, the Commission will permit the state regulatory agencies or nonregulated electric utilities to establish rates for purchases for full avoided costs, or at a lower rate, if the state regulatory authority or nonregulated electric utility determines that the lower rate will provide sufficient encouragement of cogeneration and small power production (45 Fed. Reg. 12223).

Thus, the suggestion that the Commission violated PURPA by denying Allied rates based on avoided costs is specious.

---

[8] Because only "new capacity" is entitled to rates based on full avoided costs, owners of "old capacity" may charge these rates only if they establish that such rates are essential to their survival. 18 C.F.R. 292.304(b)(2) and (3). Allied made no attempt to make such a showing before the Commission.

POINT III

There is no conflict between the New York Court of Appeals' holding and decisions of other jurisdictions.

Allied suggests that review of the Court of Appeals' decision is needed to settle a conflict "with decisions rendered by this Court and the courts of last resort of other states" (Allied, 14). A review of the decisions cited by Allied, however, demonstrates no such conflict.[9]

First, Allied describes *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 416 (1983) as assuming that FERC's regulations entitled all qualifying facilities to rates based on full avoided costs (Allied, 14-15). The issue in *American Paper Institute, Inc.*, however, was whether FERC acted unlawfully in ordering utilities to pay rates equal to full avoided costs, not whether "old capacity" warranted such rates. Indeed, there was absolutely no debate or discussion of whether "old capacity" was entitled to avoided costs, nor could there be in the face of FERC's unequivocal statement that the avoided cost entitlement was limited to "new capacity" (45 Fed. Reg. 12223).[10]

Second, Allied cites *Bates Fabric, Inc. v. Public Utilities Commission*, 447 A2d 1211 (1982) as holding that old capacity is entitled to rates based on full avoided costs (Allied, 16). In fact, *Bates* simply stands for the proposition that PURPA denies a state regulatory commission power to modify a utility power

---

[9] The Court of Appeals decision interprets the doctrine of *res judicata*, not PURPA, but even accepting Allied's assumption that the decision implicitly endorses the Commission's 1985 ruling, there is no conflict.

[10] The Court did not reference Part 292.304(b), which discussed the distinction between new and old capacity, because that regulation was not at issue.

purchase contract executed before PURPA's enactment. Indeed, the Main Supreme Court decided that neither state law nor PURPA gave the Maine PUC jurisdiction of such contracts and it, therefore, affirmed the Commission's decision refusing to resolve a dispute between Bates and a Maine utility. Of course, the holding has no application to this case because Allied's contract with Niagara Mohawk was executed *after* the implementation of FERC's regulations.

Third, the petitioner argues that the Court of Appeals' ruling is at odds with *Kansas City Power and Light Company v. State Corporation Commission*, 676 P.2d 764 (1984), app. dism. 479 U.S. 801 (1986) which held that PURPA preempted the states from setting rates above full avoided costs. Inasmuch as the Commission's 1985 ruling does not concern this question, there can be no serious contention that the Court of Appeals' *res judicata* decision is at odds with *Kansas City Power and Light.*

Finally, Allied claims that the Court of Appeals' decision contradicts its position in *Matter of Consolidated Edison Company v. Public Service Commission*, 63 N.Y. 424 (1984), app. dism. 470 U.S. 1075 (1985), which upheld the constitutionality of New York Public Service Law Section 66-c.[11] In that case, the Court of Appeals found that the Federal Power Act preempted the states from requiring utilities to purchase

[11] Section 66-c requires New York's electric utilities to purchase electricity from qualifying facilities at a minimum rate of six cents per kilowatt hour. On April 14, 1988, FERC issued a declaratory order preempting Section 66-c, but it stayed its order on June 15, 1988. FERC's action is now under judicial review.

energy from facilities that did not qualify as QFs under PURPA, but it found no such conflict with Section 66-c's six cent pricing provision.[12]

There is certainly no inconsistency between the Court of Appeals' *res judicata* holding in this case and its preemption decision in *Matter of Consolidated Edison Company.*

[12] Allied's petition appears to suggest that the Public Service Commission appealed the portion of the Court of Appeals ruling preempting Section 66-c's definition of QFs (Allied, 17-18). We did not. The only appeal in that case was that of Con Edison, which sought review of Section 66-c's six cent provision.

Conclusion

The New York State Court of Appeals' decision is consistent with settled *res judicata* doctrine. It involves no federal question and does not warrant further review. Moreover, the Public Service Commission's 1985 ruling represents a rational reading of FERC's regulations implementing PURPA. The petition for certiorari should be denied.

Respectfully submitted,

WILLIAM J. COWAN
General Counsel to the
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223
(518) 474-1286

LAWRENCE G. MALONE*
of Counsel

Dated: Albany, New York
December 1, 1988

* *Counsel of Record*